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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 1017

THE BOEING COMPANY,
Appellant,

v.

PHILLIP HAMM, AS COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA,
Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO.

THE BOEING COMPANY,

Appellant,

v.

PHILLIP HAMM, as Commissioner of Revenue of the State of Alabama,

Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

JURISDICTIONAL STATEMENT

● OPINIONS BELOW

The opinion of the Alabama Supreme Court of October 3, 1968, and the opinion of said Court of November 7, 1968, modifying and extending the prior opinion, and denying appellant's application for rehearing, are reported at _____ Ala. _____, 216 So.2d 288. On November 7, 1968, the Supreme Court of Alabama also issued a final judgment and decree reversing and annulling the judgments of the Circuit Court of Montgomery County. Neither such final judgment and decree nor the opinions and judgments of the Circuit Court of Montgomery County have been reported. Copies of an

"Opinion and Judgment" of the Circuit Court of Montgomery County,* the opinions of the Supreme Court of Alabama of October 3, 1968 and November 7, 1968, and the final judgment and decree of the Supreme Court of Alabama of November 7, 1968 are annexed hereto as Appendices A, B and C, respectively.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. *The nature of the proceeding.* Appellant brought suit against the Commissioner of Revenue of the State of Alabama under Code of Alabama 1940 (Recomp. 1958) as amended, Title 51, Section 890 (App. E-1) to recover sales tax which it had paid under protest on certain purchases made by it in the course of its performance of contracts with the National Aeronautics & Space Administration (NASA), an agency of the United States Government.

The principal thrust of the complaint, for purposes of this appeal, is plaintiff's averment that the sales tax which it paid under protest was paid upon sales which were required to be exempted by the terms of Title 51, Section 786(4), Code of Alabama 1940 (Recomp. 1958), as amended (App. D at 43a and App. E at 69a) as being "sales of tangible personal

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* Under the applicable Alabama tax refund statute (App. E-1), periodic suits were required. Such suits were consolidated for trial. Appendix A shows the first of the eighteen identical opinions and judgments which were issued by the Circuit Court. The pleadings in all the suits were identical except for the time periods and dollar amounts of claims shown in the complaints. The consolidation was continued on appeal, and the Supreme Court of Alabama issued only a single opinion (i.e., the October 3, 1968 opinion as modified on November 7, 1968) and decree covering the consolidated group of cases. For convenience, we herein shall treat these suits as a single case.

property . . . which the State of Alabama is prohibited from taxing under the Constitution . . . of the United States . . . ." (R 7)

The Circuit Court of Montgomery County, Alabama determined and adjudged that the entire amount of the tax should be refunded. (App. A) The Circuit Court based its decision, *inter alia*, on a finding that the identification between appellant and NASA, in matters of purchasing, was such as to constitute NASA the real purchaser of the property acquired, so that the effect of the imposition was to tax an instrumentality of the Federal Government directly, in contravention of the doctrine of sovereign immunity. (App. A at 5a-6a)

On appeal, the Supreme Court of Alabama reversed. The manner in which the validity of the Alabama Sales Tax Statute, as applied to appellant, was drawn into question in the Supreme Court of Alabama is detailed below in appellant's *Statement of the Case.*

This proceeding is an appeal from the opinions, judgment and decree of the Supreme Court of Alabama, made and entered finally on November 7, 1968, reversing and annulling the judgments of the Circuit Court of Montgomery County, Alabama.

2. *The judgment and decree sought to be reviewed.* The Supreme Court of Alabama issued an opinion, dated October 3, 1968, reversing the judgments of the Circuit Court of Montgomery County. Appellant filed an application for rehearing, pursuant to which the opinion of October 3, 1968 was modified and extended by a further opinion which was

dated and entered on November 7, 1968. (App. B) On the same day, the Supreme Court of Alabama also entered a separate judgment and decree denying appellant's application for rehearing, reversing and annulling the judgments of the Circuit Court and determining that no part of the taxes which had been collected under protest were due to be refunded to appellant. (App. C) The notice of appeal to this Court was filed in the Supreme Court of Alabama on January 30, 1969.

3. *The statutory provision believed to confer on this Court jurisdiction* of the appeal is 28 U.S.C. Section 1257(2).

4. *Cases believed to sustain the jurisdiction: First Agricultural National Bk. v. State Tax Com'n*, 392 U.S. 339, 88 S. Ct. 2173, 20 L. Ed. 2d 1138 (1968); *rev'g* 229 N.E.2d 245 (Mass. 1967); *U.S. v. Boyd*, 378 U.S. 39 (1964), *aff'g* 211 Tenn. 139, 363 S.W.2d 193 (1962); *McCollum v. Board of Education*, 333 U.S. 203 (1948), *rev'g* 396 Ill. 14, 71 N.E.2d 161 (1947); *U.S. v. Allegheny County*, 322 U.S. 174 (1944), *rev'g* 347 Pa. 191, 32 A.2d 236 (1943); *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942), *rev'g* 19 Cal. 2d 104, 119 P.2d 329 (1941); *Bryant v. Zimmerman*, 278 U.S. 63 (1928), *aff'g* 241 N.Y. 405, 150 N.E. 497 (1926); *Saltonstall v. Saltonstall*, 276 U.S. 260 (1928), *aff'g* 256 Mass. 519, 153 N.E. 4 (1926); *Fiske v. Kansas*, 274 U.S. 380 (1927), *rev'g* 117 Kan. 69, 230 P. 88 (1924); *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282 (1921), *rev'g* 185 Ky. 386, 215 S.W. 76 (1919); *Kansas City So. Ry. v. Road Imp. Dist. No. 6.*, 256 U.S. 658 (1921), *rev'g* 139 Ark. 424, 215 S.W. 656 (1919); *Dickinson v. Stiles*, 246 U.S. 631 (1918), *aff'g* 137 Minn. 410, 163 N.W. 791 (1917); *Miedreich v. Lauenstein*, 232 U.S. 236 (1914), *aff'g* 86 N.E. 963 172 Ind. 140 (1909); *General Oil Co. v. Crain*, 209 U.S.

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5. *State statute the validity of which is involved.* The Alabama Sales Tax Statute is set out in Act No. 100, 1959 Second Special Session of the Legislature of Alabama (Acts of Alabama—1959, Vol. 1 at 298), effective October 1, 1959. (Hereinafter cited as "Act No. 100".) The Act is reproduced verbatim as Appendix D. There have been a few amendments to the Sales Tax Statute since October 1, 1959, but none of them affects the present case in any respect.

For convenience of reference, the portions of Act No. 100 which are immediately involved in this case are excerpted and printed in Appendix E in the form in which they appear in Code of Alabama 1940 (Recomp. 1958), as amended. The said Code usually will be cited hereinafter by Title and Section only.

QUESTION PRESENTED

Whether the Alabama Sales Tax Statute (Appendices D and E), as applied to appellant, is in contravention of the Federal Constitutional doctrine of implied sovereign immunity.

STATEMENT OF THE CASE

Introduction

During the period from April 1, 1963 through May 31, 1966, appellant, The Boeing Company, was engaged in the

performance of two contracts with the National Aeronautics & Space Administration (NASA), an agency of the United States Government. This controversy arises from imposition by the State of Alabama of sales taxes on acquisitions of tangible personal property by appellant in the course of its performance of such contracts. Appellant contends in this Court, and has contended in the courts below, that, in acquiring such property, it acted as an agent of NASA (and thus of the United States), and that its acquisitions therefore were immune from taxation under the doctrine of sovereign immunity.

The Nature of the Alabama Sales Tax

The Alabama Sales Tax Statute is imposed upon sales that take place within the State of Alabama and that constitute "retail sales." "Retail sales" are defined to mean "all sales of tangible personal property except those . . . defined as wholesale sales." Act No. 100, Section 1(j); Title 51, Section 786(2)(j).

The tax is determined by the application of stated rates to gross sales or gross receipts, and is collected from the person who makes the sale. Act No. 100, Section 2; Title 51, Section 786(3). However, the seller is required to state the tax separately, to add it to the purchase price, and to collect it from the purchaser and remit it to the state (Act No. 100, Section 24; Title 51, Section 786(25)) unless the person from whom the tax is sought to be collected by the seller holds a direct-pay permit from the Department of Revenue. Act No. 100, Section 29; Title 51, Section 786(30). In the present case, appellant held such a permit, and accounted directly to the State Department of Revenue for any sales tax that it might owe.

Consequently, the tax paid under protest and involved in this case was not paid through vendors, but was paid directly by appellant to appellee.

By specific exemption, the tax is not payable by *anyone* if its incidence would fall upon one whom "the state is prohibited from taxing under the Constitution or laws of the United States . . . . " Act No. 100, Section 3; Title 51, Section 786(4).

The Alabama Sales Tax is undisputedly a "vendee tax" or "consumer's tax" the incidence of which falls upon "'the last person to whom property passes in the course of ownership.' *National Linen Service Corp. v. State Tax Comm.*, 237 Ala. 360, 186 So. 478." (App. B at 16a)

How the Federal Question Was Raised in the Proceedings Below

In its bills of complaint, plaintiff averred that the tax which it sought to recover was a tax which it had paid under protest upon sales "which are exempt by the terms of Title 51, Section 786(4), Code of Alabama 1940 (Recomp. 1958), as amended, and that said tax . . . was excessive, illegal and invalid because it was collected upon the sale of tangible personal property which the State of Alabama is prohibited from taxing under the Constitution and laws of the United States . . . . " (R 7)

Appellee Commissioner of Revenue, in the assignments of error which he filed in the Supreme Court of Alabama (R 1125A) charged error in the trial court's holding that the purchases made by appellant (appellee in the Supreme Court of Alabama) were "sales made by the suppliers directly to the

United States Government, and immune as such from the levy of the Alabama State Sales Tax." (R 1125B)

The levy of the Alabama Sales Tax Statute (i.e., the section of the statute which imposes the tax) is Act No. 100, Section 2; Title 51, Section 786(3).

There are a number of specific exemptions from the levy of the general sales tax, including the exemption for sales which the state cannot constitutionally tax, which is set out in Act No. 100, Section 3; Title 51, Section 786(4).

In its opinion of October 3, 1968, the Supreme Court of Alabama, after reviewing the facts and the determinations of the trial court, said:

> "Under these circumstances we are called upon to decide whether or not Boeing is entitled to exemption from the payment of sales tax to the State of Alabama based upon the doctrine of sovereign immunity." (App. B at 24a)

The Supreme Court of Alabama then reviewed the facts in certain other government contractor cases, and expressed disagreement with the trial court's determination that the identification of Boeing and NASA were such as to constitute NASA the real purchaser. Thereupon, the court said:

> "It follows . . . that the decree appealed from is reversed." (App. B at 29a)

Such reversal was confirmed in the November 7, 1968 opinion denying rehearing. (App. B at 32a)

Thus, the bills of complaint raised the question of Boeing's entitlement to exemption under Title 51, Section 786(4); the Supreme Court of Alabama stated the question as being the question it was "called upon to decide"; and the effect of its decision was to *deny* the exemption, which is to impose the levy of Title 51, Section 786(3) and thereby to apply the Alabama Sales Tax Statute in the face of a complaint that denial of the exemption would contravene the Constitution of the United States.

The necessary intendment and effect of the final judgment of the Alabama Supreme Court was to so apply the Alabama Sales Tax Statute as to uphold its validity against a contention by appellant that, as applied, the said statute is repugnant to the Constitution of the United States. Where both parties treat the suit as one involving the validity of a state statute, as against a claim of its repugnancy to the Constitution of the United States, and the highest court of the state deals with the question upon this basis and renders a final judgment, the effect of which is to uphold the validity of the statute, this Court has jurisdiction on appeal under 28 U.S.C. Section 1257(2). *McCollum v. Board of Education* 333 U.S. 203 (1948), *rev'g* 396 Ill. 14, 71 N.E.2d 161 (1947); *U.S. v. Allegheny County*, 322 U.S. 174 (1944), *rev'g* 347 Pa. 191, 32 A.2d 236 (1943); *Bryant v. Zimmerman*, 278 U.S. 63 (1928), *aff'g* 241 N.Y. 405, 150 N.E. 497 (1926); *Saltonstall v. Saltonstall*, 276 U.S. 260 (1928), *aff'g* 256 Mass. 519, 153 N.E. 4 (1926); *Fiske v. Kansas*, 274 U.S. 380 (1927), *rev'g* 117 Kan. 69, 230 P. 88 (1924); *Dahnke–Walker Co. v. Bondurant*, 257 U.S. 282 (1921), *rev'g* 185 Ky. 386, 215 S.W. 76 (1919); *Kansas City So. Ry. v. Road Imp. Dist. No. 6*, 256 U.S. 658 (1921), *rev'g* 139 Ark. 424, 215 S.W. 656 (1919); *Dickinson v. Stiles*, 246 U.S. 631 (1918), *aff'g* 137 Minn. 410, 163 N.W. 791 (1917);

Miedreich v. Lauenstein, 232 U.S. 236 (1914), *aff'g* 172 Ind. 140, 86 N.E. 963 (1909); *General Oil Co. v. Crain*, 209 U.S. 211 (1908), *aff'g* 117 Tenn. 82, 95 S.W. 824 (1906); *McCullough v. Virginia*, 172 U.S. 102 (1898), *rev'g* 90 Va. 597, 19 S.E. 114 (1894); *Arrowsmith v. Harmoning*, 118 U.S. 194 (1886), *aff'g* 42 Ohio St. 254 (1885).

The following cases are notable examples of appeals to this Court from judgments of state courts wherein such courts had construed statutory exemptions from tax in such ways as to foreclose their availability to government instrumentalities or contractors: *First Agricultural National Bk. v. State Tax Com'n*, 392 U.S. 339, 88 S.Ct. 2173, 20 L. Ed. 2d 1138 (1968), *rev'g* 229 N.E.2d 245 (Mass. 1967); *U.S. v. Boyd*, 378 U.S. 39 (1964), *aff'g* 211 Tenn. 139, 363 S.W.2d 193 (1962); *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942), *rev'g* 19 Cal. 2d 104, 119 P.2d 329 (1941).

Statement of Facts

a. *The contracts in general.* All the transactions which gave rise to this litigation took place under two contracts between appellant and NASA. These contracts are No. 5608 (a so-called "research and development" contract) and No. 5606(F) (a so-called "facilities" contract). (R 442 and 798, respectively)

The objectives of the contracts were to accomplish design and manufacture of the first-stage Saturn booster rocket, to establish test facilities, and to carry out systematic performance tests on the entire Apollo-Saturn space vehicle.

The purchases upon which Alabama sales tax was imposed were made in connection with appellant's operations in Alabama. Such operations included not only engineering

services, but the fabricating and installing at Marshall Space Flight Center of immense test facilities which, after installation, were used, for the most part, not solely by appellant, but by NASA or jointly by appellant, NASA and other prime contractors with NASA. (R 240-242, 254, 279, 281-283, 508)

Appellant is referred to, on the second page of Contract No. 5608, as "an independent contractor and not an agent of the government." (R 444) No label, either of "independent contractor" or otherwise, appears in Contract No. 5606(F). The comparable provision in the latter contract is: "The contractor shall at government expense, in accordance with the terms and conditions detailed elsewhere in this contract accomplish . . .[the work required to be done]." (R 800)

Despite the *label* of "independent contractor" in Contract No. 5608, other elements of the contracts, when examined along with the terms of the purchase orders and the actual practices of appellant and NASA, brought the trial court to the conclusion that appellant was *not* an independent contractor *insofar as purchasing was concerned.* (App. at 5a-6a)

b. *The nature of the procurements.* All property procured under the contracts was tangible personal property and remained such. None of the property was used in or as building materials, nor did such property ever become part of any realty. (R 228, para. 7)

The types of items which were procured, and the classification of such items into three categories known as "facilities equipment 5606(F)", "special tooling and R & D" and "consumable overhead" are described in detail in paragraph

11 of the Stipulation of Facts. (R 232-234) The first two categories are "direct charge" items, while the overhead purchases are "indirect charge" items, the costs of which are reimbursed to appellant as part of an overhead rate.

c. *The contract terms relating to title to property; practice thereunder.* The pertinent contract terms relating to title to property are set out in Appendix F. Appellant contends that title to every item of property that it acquired passed directly from the supplier to the Government. According to the indisputed testimony of the Government Property Officer, Mr. Paul McCutcheon, appellant was allowed to have no "corporate inventory," so that even "indirect charge" purchases passed from the supplier directly into Government inventory and ownership. (R 262-264, 272-273)

d. *The purchase order terms and conditions indicate that procurements were for the account of NASA.*

(1) From April 1, 1963 until July 1964, the January 1963 form of purchase order terms and conditions were used. (R 870) References to Armed Services and NASA Procurement Regulations run throughout these terms and conditions, indicating that the procurements are for contracts with NASA.

Paragraph 6 ("Inspection") provides that, except for items which were inspected and accepted by the Government at source for direct shipment to the Government, all procurements are subject to final inspection and acceptance by appellant. (R 872) However, title is not held in suspense.

Paragraph 13 ("Title and Risk of Loss") provides that the vendor retains title and risk of loss until delivery at the f.o.b.

point designated on the face of the contract. (R 874) This printed paragraph in the January 1963 form was sometimes supplemented with a note, typed on the face of the purchase order, to the effect that "Title to property delivered hereunder shall vest in the Government." (For example, see R 895 and 896)

All the provisions in Paragraph 18 ("Conditions Applicable If Government Contract Number Appears on Face of Order") (R 875)* were applicable in "direct charge" procurements (i.e., all procurements except "consumable overhead"). Paragraph 18 [really 19] makes clear that such procurements were for the account of the Government. Otherwise, the Renegotiation Act of 1951 could not have been applicable, and it was specifically made applicable by paragraph 18(e) [19(e)]. Also, under paragraph 18(k) [19(k)] the "Buyer" (Boeing) is designated as "Contracting Officer" for purposes of ordering any termination of work under the purchase order. The "Contracting Officer" under Section 7-105.8 of the Armed Services Procurement Regulations is an agent of the Government.

Other references to situations in which the vendor rather than appellant is to be denominated the "Contractor" appear in omitted paragraph 18 (see R 887 for equivalent) and throughout paragraph 18[19].

(2) In July 1964, when the purchase order terms and conditions shown at Record 881 ff. were put into effect,

* Actually Paragraph 18 should have been numbered 19. The court reporter omitted 18 (Security Requirements) by accident. The omission is harmless, for the identical term appears at R 887.

modifications to the preexisting form were made in such a way as to integrate such terms and conditions more completely with the NASA Procurement Regulations and to omit general references to ASPR (which, presumably, had now been replaced entirely by NASA PR for NASA contract purposes). In addition, the purchase order form was brought into more perfect conformity with the provision of Schedule Article XXIV of Contract No. 5608, requiring the contractor to include in each purchase order appropriate language reflecting the intent that title to procurements is to vest directly in the Government. This was done by revision of paragraph 13 ("Title and Risk of Loss") to read as follows:

> "13. *Title and Risk of Loss*—Unless otherwise provided in this order, Seller shall have title to and bear the risk of any loss of or damage to the items purchased hereunder until they are delivered in conformity with this order at the f.o.b. point specified on the face hereof and upon such delivery title shall pass from Seller and Seller's responsibility for loss or damage shall cease except for loss or damage resulting from Seller's negligence. Passing of title upon such delivery shall not constitute acceptance of the items by Buyer. *If Government Contract Numbers NAS 8-5608, 8-5606(F) or 8-2577 appear on the face of this order all items to be delivered hereunder are for the use of the Government and title to said items shall pass directly from the Seller to the Government and shall at no time vest in the Buyer.*" (R 885) (Emphasis added)

The Representative Purchase Orders (R ~~876~~ 894 ff.) show that Contract No. "NAS 8-5608" or No. "NAS 8-5606(F)" appears

on the face of almost every direct charge purchase order (i.e., on all purchase orders for all procurements except "consumable overhead"). Sometimes, purchase orders from July 1964 forward also contain a typed note reciting that title passes directly from the vendor to the Government, as well as the title and risk of loss provision set out above. (R 909)

Furthermore, the July 1964 form of terms and conditions is sprinkled throughout with references to situations in which the vendor, rather than appellant (Boeing), is to be deemed the "Contractor," and the purchase order is made the "Contract" for purposes of NASA PR. Especially is this so in paragraph 19 ("Conditions Applicable If Government Contract Number Appears on Face of Order"), and in 19(h) there once again appears a provision by which "Buyer" (Boeing) is constituted the "Contracting Officer." (R 887-888) Renegotiation requirements also are again imposed. (R 886, para. 15)

The more substantial purchase orders, and orders for some categories of less costly items, were required by the contracts and the practices of the parties to be approved by NASA. (R 242-243, 253-254, 260, 273) The Contracting Officer actually entered his signature on the original purchase order, thereby signifying the Government's commitment to the order. (R 242 and see, for ex., R 909-917)

e. *Payment and reimbursement.* Appellant issued the purchase orders and paid for the procurements with its own checks. However, not only did the Government commit itself to most of the orders through the signature of the Contracting Officer, but, under the system of direct billing and overhead

rate billing by appellant to NASA, Government reimbursement to appellant is almost simultaneous with remittances by appellant to vendors. (R 245) Thus, appellant in effect is not required to maintain and use its own working capital in procurements under the contracts, but is furnished with funds of the Government for the procurements. This system was effected for the mutual benefit of NASA and appellant. (R 245)

Opinion and Judgment of the Circuit Court of Montgomery County, Alabama

The trial court, on the basis of all the facts, found that appellant's "identification" (i.e., its agency) with NASA, in matters of purchasing, was

> "sufficiently close and sufficiently well noticed or understood by all relevant parties to the transactions under the contracts to constitute NASA (i.e., the Federal Government) the real purchaser of the tangible personal property which was procured . . . . [T]he acquisitions . . . were in contractual and practical effect for the account of the Federal Government, which permitted its contractor in this instance to maintain no corporate inventory and to receive title to nothing." (App. A at 5a-6a)

Accordingly, the procurements were immune from the Alabama Sales Tax. (App. A at 6a)

The trial court also ruled, that, should appellant be deemed to be the purchaser of what it procured, then its suppliers' sales

to it should be considered to be sales for resale, and therefore not subject to the tax.

The tax was adjudged to be due to be refunded. (App. A at 8a)

Opinions and Decree of the Supreme Court of Alabama

On appeal, the Supreme Court of Alabama, in an opinion issued October 3, 1968, (App. B) reversed and remanded, holding that the Alabama Sales Tax Statute as applied to appellant did not violate the implied sovereign immunity doctrine. The conclusion that the tax was not unconstitutionally applied was in large part based on language found in only one of the contracts in question, which language denominated the appellant an "independent contractor." The opinion reflected little consideration of the other relevant contract terms, the terms of the purchase orders, or the actual practices of the appellant and the United States Government. The Alabama Supreme Court further did not rule on the sale for resale issue, and gave no instructions to the trial court as to the proper disposition of this issue upon remand.

On October 17, 1968, the appellant filed an application for rehearing, requesting the court to withdraw its decision of October 3, 1968, and enter an order affirming the judgments of the Circuit Court of Montgomery County, Alabama. As grounds for such application, the appellant assigned as error:

(1) the reversing of the judgments below based almost entirely upon a single formal term contained in only one of the

contracts which gave rise to the procurements, and with only a very limited consideration of the terms of the purchase orders and the actual practices of the appellant and NASA; and

(2) the reversing and remanding of the case solely on the basis of the agency issue, without ruling upon the alternative ground that the sales in question were sales for resale and, for that reason, not subject to the tax.

On November 7, 1968, the Supreme Court of Alabama entered an opinion extending and modifying its opinion of October 3, 1968 and denying appellant's application for rehearing. (App. B at 29a-32a) In the later opinion, the court reaffirmed its conclusion that the sales tax was not collected in contravention of the doctrine of sovereign immunity, and further held that the sales in question were not sales for resale. The court thereupon entered a decree which reversed and annulled the judgments of the trial court, and entered in their stead a judgment that the sales taxes collected from appellant were legally and validly collected and that no part thereof was due to be refunded. (App. C at 33a-34a)

SUBSTANTIALITY OF FEDERAL QUESTIONS

This case raises vital questions in the field of state taxation of government contractors. Despite a considerable amount of lititation regarding the powers of the states to impose a general sales tax upon sales to contractors with the United States Government, there still remains a gulf of uncertainty between *Alabama v. King & Boozer*, 314 U.S. 1 (1941), and *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110 (1954). Both the

Government and its contractors are in need of additional guidelines from this Court.

Among the reasons why this case should be given plenary consideration, with briefs on the merits and oral argument, are the following:

Reason I: **The decision below represents an unwarranted restriction upon the agency basis for constitutional immunity of government contractors from state sales tax. It is in direct conflict with *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954).**

Alabama v. King & Boozer, supra, and *Kern-Limerick, Inc. v. Scurlock, supra*, represent famous extremes of the sovereign immunity situation as it relates to the imposition of sales taxes.

In *Alabama v. King & Boozer*, this Court allowed application of Alabama's then-existing Sales Tax Statute in a case wherein the contract provided that title to building materials delivered by the contractor to the job site should pass to the United States after inspection and written acceptance by a Contracting Officer acting for the United States. The status of title, between delivery to the contractor and approval by the Contracting Officer at the site is not clear. Pursuant to a requirement of the contract, the purchase order form provided specifically that "This purchase order does not bind, nor purport to bind, the United States Government or government officers." 314 U.S. at 11.

On these facts the Court held that the contractor was to be considered the "purchaser" upon whom the tax was imposed under the Alabama statute. 314 U.S. at 12.

Implicit in *King & Boozer* is the assumption that, had the purchases been those of the United States, they would have been exempt from Alabama sales tax.

In *Kern-Limerick, Inc. v. Scurlock* this Court confirmed the assumption just stated and held invalid the application of the Arkansas sales tax to a procurement under a government contract which provided specifically that the contractor would act as purchasing agent for the Government, title to the articles purchased would pass directly from the vendors to the Government, and the Government, whose interest was revealed in the purchase orders, would be directly liable to the vendors for the payment of the purchase price. On these facts, the Court held that the real purchaser was the United States. 347 U.S. at 121.*

The facts of the instant case are not identical either with those in *King & Boozer* or with those in *Kern-Limerick, Inc.* However, if *Kern-Limerick, Inc.* stands for the principle that a contractor who is *in fact* the purchasing agent of the Government is clothed with the immunity of the sovereign—as appellant contends—then the decision of the Supreme Court of Alabama in this case in in conflict with *Kern-Limerick* and constitutes an unwarranted restriction upon established procurement practices of the United States Government.

In its first opinion below, the Supreme Court of Alabama quoted from the opinion of the Supreme Court of Tennessee in

* It is noteworthy that, in so holding, the Court indicated that its decision turned, not on the presence in the contract of the conclusionary label "purchasing agent," but upon substantive considerations deemed significant in the general law of agency. See, 347 U.S. at 121, n. 10.

United States v. Boyd, 211 Tenn. 139, 363 S.W.2d 193, 198, (1962),* as follows:

> "'The general distinction then between these two cases [*King & Boozer* and *Kern-Limerick, Inc,*] is the finding of an agency relationship between the Government and the contractor for the purchase of materials in the Kern-Limerick case. This finding was based upon (1) *the terms of the contract*, (2) *the terms of the purchase orders*, and (3) *the actual practice of the Navy to exercise its reserved right to approve each request for bids and each purchase.*' (Emphasis added.)" (App. B at 25a-26a)

Affirming this analysis—which appellant also contends to be correct—the court then quoted from *Kern-Limerick, Inc.* an observation, which appears toward the end of the opinion of the Court in that case, that "'* * * the form of contracts, when governmental immunity is not waived by Congress, my determine the effect of state taxation on federal agencies * * * '" [347 U.S. at 122-23] (App. B at 26a)

Upon this predicate, the court stated that it thought the trial court had overlooked the significance of the contract provision which labeled appellant "an independent Contractor and not an Agent of the Government," and concluded in effect, that this single provision in the form of only one of the two contracts determined the effect of the particular state taxation upon NASA.

* A use tax aspect of this case was considered in this Court. *United States v. Boyd*, 378 U.S. 39 (1964). Such aspect is not relevant in this case since such tax was determined to be a *possessory* use tax.

What the Supreme Court of Alabama appears to have overlooked is the further statement in *United States v. Boyd, supra*, 363 S.W.2d at 200, that

> "The decision of agency or lack of agency does not necessarily rest on . . . [*King & Boozer* and *Kern-Limerick*]. *The mere placing of terms such as agent or independent contractor in the contract does not make them such in law. The surrounding facts and circumstances determine the relationship.*" (Emphasis added)

The Supreme Court of Alabama, while apparently acknowledging that title never vested in appellant, equated the title terms herein with those in *Alabama v. King & Boozer* (App. B at 27a). The equation simply is not correct, for it ignores (a) the use of a Government inventory only (which deprived appellant of the independent dominion over property which was present in *King & Boozer* at least from the time of placing an order until the contractor had the goods inspected by the Government at the construction site), and (b) the purchase order terms and conditions which advised all the world that the procurements were for the account of NASA, and which appellant contends had the effect of constituting it a purchasing agent as a matter of fact and law. Furthermore, the court's conclusion fails to take into account the reimbursement schedule which, in practice, relieved appellant from having to use its own working capital in making procurements.

The question of whether "legal incidence" is to be determined by a single term in the form of a contract, labeling the contractor as independent, or is to be controlled by

contrary considerations of substance, raises, in the instant case, a substantial federal question.

In *Kern-Limerick, Inc., supra*, this Court, after referring to a passage in *King & Boozer* to the effect that "Who, in any particular transaction . . . is a 'purchaser' within the meaning of the statute, is a question of state law . . . ", said,

> "Read literally, one might conclude this Court was saying that a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign. Such a conclusion as to the meaning of the quoted words would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest. The quotation refers, we think, only to the power of the state court to determine who is responsible under its law for payment to the state of the exaction." 347 U.S. at 121.

Clearly, the narrow basis employed by the Supreme Court of Alabama to determine whether the "legal incidence" of the tax fell upon Boeing, or upon the United States *through* Boeing as its agent in dealing with suppliers, raises a substantial federal question which should be determined by this Court.

Reason II: **The decision below is in conflict with other state court decisions involving similar facts under similar state laws.**

The trial court below, in ruling that appellant's purchases were within "the immunity each sovereign enjoys from taxation by the other," referred to, and apparently found apposite, the following decisions of the highest courts of Maryland, Connecticut and Tennessee: *Tawes v. Aerial Products, Inc.*, 210 Md. 627, 124 A.2d 805 (1956); *Avco Mfg. Corp. v. Connelly*, 145 Conn. 161, 140 A.2d 479 (1958); *United States v. Boyd*, 211 Tenn. 139, 363 S.W.2d 193 (1962). (App. A at 5a)

The facts and statutes construed in these cases, in all of which the procurements were held to be immune from state sales tax, are not identical with those in the instant case. They are sufficiently similar, however, that the different outcome of this case in the court below is bound to be a source of substantial discord and confusion concerning just what considerations are required to be taken into account in determining "legal incidence" for sovereign immunity purposes. On this issue, the states, the contractors and the Federal Government all need additional guidelines.

The common theme of the Maryland, Connecticut and Tennessee cases referred to above is that agency or the lack of agency must be determined from consideration of *all* the facts and circumstances, and not from the presence or absence of a label. *Tawes v. Aerial Products, Inc., supra*, 124 A.2d at 812; *Avco Mfg. Co. v. Connelly, supra*, 140 A.2d at 483; *United States v. Boyd, supra*, 363 S.W.2d at 198 and 200.

We have noted before the pronouncement in *United States v. Boyd, supra*, 363 S.W.2d at 200, that "The mere placing of terms such as agent or independent contractor in the contract does not make them such in law. The surrounding facts and circumstances determine the relationship."

This principle also has been stated clearly in a recent case which arose in the federal courts: In *United States v. Livingston* 179 F. Supp. 9 (E.D. S.C. 1959), *aff'd. per curiam* 364 U.S. 281 (1960), the District Court observed:

> " . . . [I]t is insisted that duPont was not the agent of the United States for procurement purposes. This insistence is founded upon the fact that the contract does not apply the word 'agent' to duPont in connection with procurement, but does specifically provide that duPont, as agent of the United States, may lease government housing and real estate. *An agent, however, need not be called by that name to be one. Liabilities of principals and immunities from taxation are not dependent upon the use, or omission, of a magic label.* It is clear that duPont's procurement activities were authorized, and were openly on behalf of the United States, and at the government's expense and risk. (Emphasis added) 179 F. Supp. at 22.

The three state court cases mentioned above, and the *Livingston* case, are not the limit of recent litigation of the agency question. There have been and are now pending numerous such cases in the lower courts of various states and in the federal district courts.

The decision below, if allowed to stand, undoubtedly will be disruptive of established procurement practices. Such decision represents a mechanistic approach which is totally at odds with the methodology approved by this Court in *Kern-Limerick, Inc. v. Scurlock* for resolving the question of agency. If left uncorrected, the decision below can only be conducive to further litigation in an area which involves the vital interests of the United States and its contractors, and which manifestly demands a greater degree of certainty.

Respectfully submitted,

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Birmingham, Alabama 35203
Attorneys for Appellant.
The Boeing Company

January 30, 1969

CERTIFICATE OF SERVICE

I, John Bingham, one of the attorneys for appellant, The Boeing Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 4 day of February, 1969, I served a copy of the foregoing Jurisdictional Statement on the Commissioner of Revenue of the State of Alabama by mailing a copy thereof in a duly addressed envelope, postage prepaid to the attorneys of record, addressed as follows:

Hon. McDonald Gallion
Attorney General
State of Alabama
Office of Attorney General
Montgomery, Alabama 36104

Hon. William H. Burton
Assistant Counsel
State of Alabama
Department of Revenue
Legal Division
Montgomery, Alabama 36102

Hon. Willard Livingston
Counsel
State of Alabama
Department of Revenue
Legal Division
Montgomery, Alabama 36102

I further certify that all parties required to be served have been served.

John Bingham
600 North 18th Street
Birmingham, Alabama 35203
Attorney for Appellant, The Boeing Company

APPENDIX A*
OPINION OF THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

IN THE
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
AT LAW

NO. 4660

THE BOEING COMPANY,
a corporation,

Plaintiff,

v.

PHILLIP HAMM, as Commissioner of Revenue
of the State of Alabama,

Defendant.

OPINION AND JUDGMENT

There is but one taxpayer in America.

He (or she) pays taxes to a Federal Government, to a State Government, to a County Government, and most cases to a Municipal Government.

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* Footnote by Counsel: The Opinion and Judgement printed here are identical with the opinions and judgments issued in each of the seventeen other cases, bearing the same style, which were consolidated for trial. Each of the said identical opinions and judgments are set out in full in the record.

All levels of government derive the bulk of their respective revenues from the same basic source—the American Taxpayer.

The Federal Government operates the National Aeronautics and Space Administration (NASA). It operates this agency on revenue derived from this common, basic source of all governments.

The National Aeronautics and Space Administration (NASA) has been given the task of sending and hopefully returning American astronauts to and from the moon during this decade. Several billion tax dollars have previously been expended to accomplish this objective and several more billion tax dollars undoubtedly will be spent in this endeavor. Every dollar expended in the past and to be expended in the future comes from this common basic source—the American Taxpayer.

In this undertaking, NASA has enlisted much of the private aeronautical industry of America to perform certain duties and functions.

This is a unique working relationship between private enterprise and a governmental agency to accomplish a national objective. The success seen in meeting this objective speaks well of such a process.

In the instant case, The Boeing Company and NASA have entered into, among others, two contracts, numbered 5606(F) and 5608 respectively. These contracts form the basis of this litigation. The contracts call for The Boeing Company to perform certain duties and functions, including the furnishing and assembling of extensive test facilities at Redstone Arsenal.

In return, the consideration due from NASA to The Boeing Company is based upon cost to Boeing only or cost to Boeing plus a fixed fee. By simple example, if Boeing in the performance of some aspect of one of these contracts found it necessary to procure some industrial tool at a cost of $750.00, NASA would pay only a like sum of $750.00 to Boeing under Contract No. 5606(F) or NASA would pay a like sum of $750.00 plus the fixed fee to Boeing under Contract No. 5608. Under 5608 the fixed fee is in no wise contingent upon the costs. The facts show these items range from typewriters and engineering drawing paper to electronic devices of all descriptions.

There is no dispute that should an item be subjected to the tax in question, such imposed tax would be included in the costs. (In the simple example above, such imposition would increase the cost of the industrial tool to $780.00.)

Simple logic points to the inescapable deduction that this increase in costs under these contracts would be borne by that common, basic source of all governmental revenue—the American Taxpayer, for anything that one sovereign takes from another necessarily affects the resources of such other and drives such other, if it is not to be hindered or even destroyed by the levy, back to the basic source of revenue. Every transfer of tax funds from government to government is attended by a proliferation of administrative costs. These costs, too, must be paid, in the end, from the one source.

Governments are instituted among men to promote the general welfare. The good wisdom of those who instituted the American System directed the establishment of a dual system

with each sovereign in its own sphere. It is called the federal-state system.

Each system, though sovereign, has but one source from which to derive revenue—the American Taxpayer. While this fact does not give rise to the principle of sovereign immunity, it does give logic to the immunity each sovereign enjoys from taxation by the other.

The Court finds from the evidence that the situation portrayed here falls within such immunity.

The Court notes the pressing problem of states to find sufficient revenue sources to adequately finance the functioning of state governments. The Court notes the fact that the Department of Revenue of the State of Alabama operates with proficiency and efficiency with this pressing problem.

The Court further notes the alarming trend of a decrease in the tax revenue sources of the state system and an increase in the tax revenue sources of the federal system. However, encroachments upon the principle of immunity by either of the sovereigns is not the way to arrest this trend.

In the instant case, imposition of the tax might not greatly hinder the national space program, nor would it necessarily add the final straw to the burden of the American Taxpayer, though substantial sums of money are here involved. There is no necessity for the Court to attempt to measure the exact extent and effect of the burden created by this tax—either immediately upon the Federal Government or finally upon the American Taxpayer—for the Court's decision here is not rested upon

economic burden. The matter of econ[illegible]burden is discussed because, as indicated above, it contrib[illegible]eighty and serious logic to the doctrine of sovereign immu[illegible]

The body of case law in the field of sovereign immunity is not small. It prominently includes the 1819 case of *McCulloch v. Maryland*, 4 Wheat. 316, and the companion cases of *Alabama v. King & Boozer*, 314 U.S. 1, 62 S.Ct. 43 (sales tax) and *Curry v. U.S.*, 314 U.S. 14, 62 S.Ct. 48 (use tax). It includes *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 74 S.Ct. 403, and a number of significant state court decisions, including *Tawes v. Aerial Products, Inc.* (Md. Ct. App.; 1956) 210 Md. 627, 124 A.2d 805; *Avco Mfg. Corp. v. Connelly* (S. Ct. Er. Conn.; 1958) 145 Conn. 161, 140 A2d 479; and *U.S. v. Boyd* (S. Ct. Tenn.; 1962) 211 Tenn. 139, 363 S.W. 2d 193.

The Court is aware also of the use tax aspect of *U.S. v. Boyd*, supra, which was appealed to the United States Supreme Court (378 U.S. 39, 84 S.Ct. 1518) and of *Associated Contractors v. Hamm* (1965) 277 Ala. 500, 172 So. 2d 385.

Suffice it to say that the development of the law to the current date has been such as to impel this Court to consider all the evidence before it, giving due regard to the nature of the taxpayer's operations and weighing the significance of each relationship that is shown by the evidence, both as such matters appear in the Stipulation of Facts and the exhibits thereto and as such matters appear to the Court from its hearing and consideration of the oral testimony which was presented at the trial.

The Court finds from the evidence that the identification between The Boeing Company and NASA, in matters of

purchasing, was sufficiently close and sufficiently well noticed or understood by all relevant parties to the transactions under the contracts to constitute NASA (i.e., the Federal Government) the real purchaser of the tangible personal property which was procured under the contracts. This conclusion is most abundantly clear as to the types of items which were categorized by the parties as "Special Tooling and R & D", "Facilities Equipment 5606(F)" and "Consumable Overhead—Accounts 203 and 211." Such conclusion, however, is also clear as to the remainder of the items, for the acquisitions of of such items were in contractual and practical effect for the account of the Federal Government, which permitted its contractor in this instance to maintain no corporate inventory and to receive title to nothing. The nature of the operation was, peculiarly, a cooperative one, involving continuing efforts and participation by NASA personnel and by other prime contractors with NASA. The test facilities required to be assembled by Boeing were not limited in use to Boeing contracts nor to Boeing personnel. These elements of the facts, inter alia, satisfy the Court that the title provisions in the instant case have substantial meaning and should be respected.

Having reached the conclusion that imposition of the taxes here in contest is forbidden by the doctrine of sovereign immunity, it is perhaps unnecessary to examine plaintiff's argument that, should Boeing be deemed to be the purchaser herein, then its vendors' sales to it should be construed as sales for resale to the Government. The point, however, is significant. Plaintiff's operations in Alabama consisted of two separately substantial undertakings: the supplying to the Government of skilled engineering services and the creation for the Government of intricate and extensive electronic test facilities. The evidence shows that the obtaining of these facilities was a separate and

substantial objective of the Government. Most of these facilities were located on Redstone Arsenal, and were used by NASA personnel and by employees of other NASA prime contractors as well as by employees of Boeing. Consequently it may be well said—and the Court so finds—that if Boeing were deemed to be the "real purchaser" of the property procured under the contracts, then such items (including all "Special Tooling and R & D" items) were purchased by Boeing for resale to NASA. Accordingly, such items, without regard to the constitutional issue, were not subject to sales tax at the vendor-to-Boeing level of the sales.

In view of the Court's finding as to the real substance of the title provisions here involved, the Court concludes that the sale-for-resale principle also would apply in favor of the other categories of purchases under contracts Nos. 5606(F) and 5608. All the procurements were made under one or the other of these contracts.

The instant case is easily distinguishable on its facts from *Alabama v. King & Boozer*, supra, *Curry v. U.S.*, supra, and *Associated Contractors v. Hamm*, supra, both as the several sets of facts appear in light of the principle of sovereign immunity and as they appear in connection with the sale-for-resale issue. Without detailing all matters of difference, the Court notes that those cases involved real estate construction contracts, the operational ramifications of which presented somewhat different pictures from the situation here. In those cases, the relationships between the contractors and the Government were found to be not such as to constitute the contractors agents of the Government, even for purchasing purposes only. Such finding affected not only the disposition of the cases under the sovereign immunity doctrine but, in real estate construction

cases, would appear to have foreclosed any sale-for-resale treatment (if, in fact, such treatment was sought).

Plaintiff urges that the real estate construction cases are *sui generis*, but no finding in this regard is necessary. It is enough to say that the whole complex of the facts in the instant case was undoubtedly affected by the fact that the work to be done under the contracts was vastly different from that which was involved in the cases of *King & Boozer*, *Curry v. U.S.*, and *Associated Contractors v. Hamm*, all supra.

The defendant admits by stipulation and testimony that procurements made under Part IX of the contract numbered 5608 are not subject to tax, and that the tax collected thereon should be refunded. In light of the matters set out above in this memorandum, such refund may be made as a part of refund of all the taxes here in contest, or it may be made separately with forthwith, without prejudice to defendant's right of appeal.

The Court does hereby determine, adjudge and declare that the sales tax collected from plaintiff under protest was illegally and invalidly collected, and the entire amount thereof is due to be and should be refunded to plaintiff as provided by Title 51, Section 891, Code of Alabama 1940 (Recompiled 1958), as amended. The costs of this proceeding are taxed against the defendant.

This case was one of eighteen actions which were consolidated for trial at the request of the parties, and which were heard by the Court on February 16, 1967. The said eighteen cases bear the same style. The case numbers are as follows: 4660, 5110, 5473, 5905, 6254, 6646, 7002, 7389, 7719, 8199, 8590, 9009, 9554, 10034, 10443, 10922, 11408

and 11901. The findings of the Court and the relief granted herein are identical with the findings and the relief granted in each of the other seventeen cases.

Done this 22nd day of June, 1967.

/s/ Richard P. Emmet

Circuit Judge

APPENDIX B
OPINIONS OF THE SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1968-69

Phillip Hamm, as Commissioner of Revenue
of the State of Alabama

v.

The Boeing Company, A Corporation
Appeal from Montgomery Circuit Court

October 3, 1968; MODIFIED November 7, 1968

SIMPSON, JUSTICE.

This is an appeal by the Commissioner of Revenue from a judgment in favor of the appellee (hereinafter Boeing) rendered by the Circuit Court of Montgomery County. Eighteen cases were consolidated for trial and are presented herein. The essential facts are as follows:

Boeing is a government contractor working with the National Aeronautics and Space Administration (NASA) in assisting to develop the proposed Apollo Saturn Moon Rocket.

Boeing paid sales tax assessed by the State under protest and filed these actions for refund under the provisions of Title 51, § 891, Code of Alabama, 1940 (Recomp. 1958). It is the State's position that the sales tax is due from Boeing on the purchase of tangible personal property made within the State of

Alabama. It is the contention of Boeing, on the other hand, that NASA was in fact the real purchaser of such items of personal property and that therefore no sales tax is due on the purchase and to so impose it would constitute a direct tax on the United States Government, in contravention of the principles of sovereign immunity.

The parties stipulated as follows:

Boeing is a corporation qualified to do business in Alabama, its principal place of business being Huntsville. Boeing is engaged in research and development work at the George C. Marshall Space Flight Center, at Huntsville, Alabama. Its work is performed as a prime contractor with the United States government under three interrelated contracts.

These contracts provide for the following: Contract No. 2577 represented the initial contractual effort leading to development of the program for design and manufacture of the first stage booster rocket—Saturn S-1C—for the Apollo Saturn Space Vehicle. The initial program was essentially complete on December 31, 1962, and any work remaining under Contract 2577 was incorporated into Contract 5608 which, as a continuation and enlargement of 2577, became effective on January 1, 1963. It is this latter contract along with Contract No. 5606(F) with which we are concerned.

Contract No. 5608 carries the initial planning through manufacture and systems test of the S-1C. Under 5608 Boeing has provided engineering design for the S-1C Booster and for test equipment such as that used in the dynamic test vehicle, which is a structure, the instrumentation for which was furnished by Boeing, in which the entire Saturn V System can

be tested, in verticle position, for structural, aerodynamic and certain other characteristics. Contract 5608 is a cost-plus-fixed-fee contract, the fixed fee being based upon estimated costs which were agreed upon by Boeing and NASA for fee determination purposes during negotiation of the contract. Contract No. 5606(F) is a cost contract only, and Boeing receives no fee in connection therewith. This contract is a facilities contract rather than a research and development contract. It is merely an agreement which establishes the terms under which Boeing was authorized and directed to acquire certain types of general use facilities with which to carry out the work required under 2577 and 5608.

With the exception of S-1C end product components and materials that Boeing ordered for direct delivery to NASA at Marshall Space Flight Center (on which no tax was paid and on which none is claimed) Boeing has paid tax under protest on its acquisitions from all sources other than GSA depots upon which no tax is claimed.

The types of items which were acquired by Boeing under Contract 5606(F) and 5608, and upon which the sales tax was paid may be divided into these general categories:

1. Facilities Equipment acquired under 5606(F):

    a. Lathes, oscilloscopes, radial saws, table saws, arc welders, generators, drill presses, heat pumps, high vacuum pumps, voltage regulators, microfilm readers, typewriters.

Generally facilities equipment may be said to be the general use equipment used in the performance of the work done under

5608. These items all have a unit cost of $200.00 or more and all items of facilities equipment 5606(F) are "direct charge" acquisitions, which means that Boeing bills NASA directly for each item that it procures.

2. Special Tooling and Research and Development (5608): Special Tooling and Research and Development is an accounting title for direct charge acquisitions under 5608. Such acquisitions consist of:

   a. Special tooling and material for the manufacture of such tooling.
   b. Other items of hardware needed in connection with testing and with the fabrication of test equipment under 5608.

Special tooling consists of tooling tools which may be designed and created for special uses under 5608; or wiring and cable out of which to create such tools. Boeing orders some special tools from others and also fabricates some special tools in its own machine shop at the Huntsville Industrial Center or in shops at Marshall Space Flight Center. Special tooling includes jigs and forms which are used for creating end products that never have been formed before. The newly formed end product may itself be a special tool (such as a custom built frame or dolly for handling test equipment or components of the S-1C Rocket itself) or it may constitute a part of an item of test equipment such as instrumentation for the dynamic test vehicle.

Special tooling and other research and development acquisitions may be primarily for use in the hands of Boeing in the performance of its work under 5608 or may be assembled and used by Boeing briefly and then delivered to NASA

personnel, or it may be procured and shipped directly to NASA or fabricated into some assembled end-item by Boeing and delivered to NASA without use by Boeing in its research and development work under the contract. The State admits that procurements for shipments directly to NASA and used solely by NASA personnel and procurements for fabrication or assembly by Boeing into end-items which after such fabrication or assembly are delivered to NASA for use solely by NASA personnel are not subject to tax. The State does maintain that all procurements of items which are used by Boeing, however briefly, in performance of its research and development work under 5608 are taxable.

This is another case which raises the question of a State's ability to tax a government contractor in the face of a claim of sovereign immunity raised by the Contractor grounded upon the assertion that the incidence of the tax is directly upon the United States in that the contractor is merely an agent of the United States Government in making the purchase, within the meaning of the Sales Tax Statute, or stated differently, the actual purchaser of the tangible personal property is the United States.

The question is not without difficulty. In *Alabama v. King & Boozer*, 314 U.S. 1, 62 S.C. 43, 86 L.Ed. 3 (involving sales tax) and the companion case of *Curry v. United States*, 314 U.S. 14, 62 S.C. 48, 86 L.Ed. 9 (involving use tax) the Supreme Court of the United States, in upholding the imposition of the Alabama Sales Tax in a case involving a government contractor operating under a Cost-plus-fixed-fee Contract, stated:

> "So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the

materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity.***

"They [the contractors] were not relieved of the liability to pay the tax either because the contractors in a loose and general sense were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractor."

Thus the Supreme Court of the United States in *King & Boozer*, supra, departed from what had been believed to be the test in such cases–the economic burden test–for immunity and replaced it with what has been frequently called the legal incidence test. Thus it is said if the incidence of a tax is directly upon the United States or its agent, it is invalid by implied immunity, while any indirect tax is valid.

It seems then that under the *King & Boozer* rationale the critical question becomes one of determining what the relationship is between the United States Government and [the] government contractor with respect to the purchase of tangible personal property. Or more succinctly the question is whether

or not the federal government itself is in effect the actual purchaser of the property so that the imposition of the sales tax would constitute a direct tax on the federal government since unquestionably under the Alabama Sales Tax Statute the incidence of the tax is the purchase at retail, the tax being borne by the consumer who is "the last person to whom property passes in the course of ownership".—*National Linen Service Corp. v. State Tax Comm.*, 237 Ala. 360, 186 So. 478.

In resolving this issue the trial court found in part as follows:

> "The Federal Government operates the National Aeronautics and Space Administration (NASA). * * *
>
> "The National Aeronautics and Space Administration (NASA) has been given the task of sending and hopefully returning American Astronauts to and from the moon during this decade. Several billion tax dollars have previously been expended to accomplish this objective and several more billion tax dollars undoubtedly will be spent in this endeavor. * * *
>
> "In this undertaking, NASA has enlisted much of the private aeronautical industry of America to perform certain duties and functions. * * *
>
> "In the instant case, The Boeing Company and NASA have entered into, among others, two contracts, numbered 5606(F) and 5608 respectively. These contracts form the basis for this litigation. The contracts call for The Boeing

Company to perform certain duties and functions, including the furnishing and assembling of extensive test facilitities at Redstone Arsenal. In return, the consideration due from NASA to The Boeing Company is based upon cost to Boeing only or cost to Boeing plus a fixed fee. By simple example, if Boeing in the performance of some aspect of one of these contracts found it necessary to procure some industrial tool at a cost of $750.00, NASA would pay only a like sum of $750.00 to Boeing under Contract No. 5606(F) or NASA would pay a like sum of $750.00 plus the fixed fee to Boeing under the Contract No. 5608. Under 5608 the fixed fee is in no wise contingent upon the costs. The facts show these items range from typewriters and engineering drawing paper to electronic devices of all descriptions.

"There is no dispute that should an item be subjected to the tax in question, such imposed tax would be included in the costs. (In the simple example above, such imposition would increase the cost of the industrial tool to $780.00.) * * *

"The body of case law in the field of sovereign immunity is not small. It prominently includes the 1819 case of *McCulloch v. Maryland*, 4 Wheat. 316, and the companion cases of *Alabama v. King & Boozer*, 314 U.S. 1, 62 S.Ct. 43 (sales tax) and *Curry v. U.S.*, 314 14, 62 S.Ct. 48 (use tax). It includes *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 74 S.Ct. 403, and a number of significant state court decisions, including *Tawes v. Aerial*

Products, Inc. (Md. Ct. App.; 1956) 210 Md. 627, 124 A.2d 805; *Avco Mfg. Corp. v. Connelly* (S.Ct. Er. Conn; 1958) 145 Conn. 161, 140 A.2d 479; and *U.S. v. Boyd* (S. Ct. Tenn.; 1962) 211 Tenn. 139, 363 S.W.2d 193.

"The Court is aware also of the use tax aspect of *U.S. v. Boyd*, supra, which was appealed to the United States Supreme Court (378 U.S. 39, 84 S.Ct. 1518) and of *Associated Contractors v. Hamm* (1965), 277 Ala. 500, 172 So.2d 385.

"Suffice it to say that the development of the law to the current date has been such as to impel this Court to consider all the evidence before it, giving due regard to the nature of the taxpayer's operations and weighing the significance of each relationship that is shown by the evidence, both as such matters appear in the Stipulation of Facts and the exhibits thereto and as such matters appear to the Court from its hearing and consideration of the oral testimony which was presented at the trial.

"The Court finds from the evidence that the identification between The Boeing Company and NASA, in matters of purchasing, was sufficiently close and sufficiently well noticed or understood by all relevant parties to the transactions under the contracts to constitute NASA (i.e., the Federal Government) the real purchaser of the tangible personal property which was procured under the

contracts. This conclusion is most abundantly clear as to the types of items which were categorized by the parties as 'Special Tooling and R & D', 'Facilities Equipment 5606(F)' and 'Consumable Overhead–Accounts 203 and 211'. Such conclusion, however, is also clear as to the remainder of the items, for the acquisitions of such items were in contractual and practical effect for the account of the Federal Government which permitted its contractor in this instance to maintain no corporate inventory and to receive title to nothing. The nature of the operation was, peculiarly, a cooperative one, involving continuing efforts and participation by NASA personnel and by other prime contractors with NASA. The test facilities required to be assembled by Boeing were not limited in use to Boeing contracts nor to Boeing personnel. These elements of the facts, inter alia, satisfy the Court that the title provisions in the instant case have substantial meaning and should be respected.

"Having reached the conclusion that imposition of the taxes here in contest is forbidden by the doctrine of sovereign immunity, it is perhaps unnecessary to examine plaintiff's argument that, should Boeing be deemed to be the purchaser herein, then its vendors' sales to it should be construed as sales for resale to the Government. The point, however, is significant. Plaintiff's operations in Alabama consisted of two separately substantial undertakings: the supplying to the

Government of skilled engineering services and the creation for the Government of intricate and extensive electronic test facilities. The evidence shows that the obtaining of these facilities was a separate and substantial objective of the Government. Most of these facilities were located on Redstone Arsenal, and were used by NASA personnel and by employees of other NASA prime contractors as well as by employees of Boeing. Consequently it may be well said—and the court so finds—that if Boeing were deemed to be the 'real purchaser' of the property procured under the contracts, then such items (including all 'Special Tooling and R & D' items) were purchased by Boeing for resale to NASA. Accordingly, such items, without regard to the constitutional issue, were not subject to sales tax at the vendor-to-Boeing level of the sales.

"In view of the Court's finding as to the real substance of the title provisions here involved, the Court concludes that the sale-for-resale principle also would apply in favor of the other categories of purchases under contracts Nos. 5606(F) and 5608. All the procurements were made under one or the other of these contracts.

"The instant case is easily distinguishable on its facts from *Alabama v. King & Boozer*, supra, *Curry v. U.S.*, supra, and *Associated Contractors v. Hamm*, supra, both as the several sets of facts appear in light of the principle of sovereign

immunity and as they appear in connection with the sale-for-resale issue. Without detailing all matters of difference, the Court notes that those cases involved real estate construction contracts, the operational ramifications of which presented somewhat different pictures from the situation here. In those cases the relationships between the contractors and the Government were found to be not such as to constitute the contractors agents of the Government, even for purchasing purposes only. Such finding affected not only the disposition of the cases under the sovereign immunity doctrine but, in real estate construction cases, would appear to have foreclosed any sale-for-resale treatment (if, in fact, such treatment was sought).

"Plaintiff urges that the real estate construction cases are *sui generis*, but no finding in this regard is necessary. It is enough to say that the whole complex of the facts in the instant case was undoubtedly affected by the fact that the work to be done under the contracts was vastly different from that which was involved in the cases of *King & Boozer*, *Curry v. U.S.* and *Associated Contractors v. Hamm*, all supra.

"The defendant admits by stipulation and testimony that procurements made under Part IX of the contract numbered 5608 are not subject to tax, and that the tax collected thereon should be refunded. In light of the matters set out above in

this memorandum, such refund may be made as a part of refund of all the taxes here in contest, or it may be made separately and forthwith, without prejudice to defendant's right of appeal.

"The Court does hereby determine, adjudge and declare that the sales tax collected from plaintiff under protest was illegally and invalidly collected, and the entire amount thereof is due to be and should be refunded to plaintiff as provided by Title 51, Section 891, Code of Alabama 1940 (Recompiled 1958), as amended. The costs of this proceeding are taxed against the defendant.

"This case was one of eighteen actions which were consolidated for trial at the request of the parties, and which were heard by the Court on February 16, 1967. The said eighteen cases bear the same style. The case numbers are as follows: 4660, 5110, 5473, 5905, 6254, 6646, 7002, 7389, 7719, 8199, 8590, 9009, 9554, 10034, 10443, 10922, 11408 and 11901. The findings of the Court and the relief granted herein are identical with the findings and the relief granted in each of the other seventeen cases."

It is clear that the trial court has determined from the facts that the United States Government (NASA) was in fact the real purchaser of the items of tangible personal property involved in these cases and hence the imposition of the tax would violate the principles of sovereign immunity.

In this connection the contracts contained the following provisions:

> "Contract 5606(F). Title to all facilities and components furnished by the government shall remain in the government. Title to all other equipment, machinery and facilities, including installation materials and freight shall vest in the government upon acquisition by the contractor, or upon installation in the government furnished plants which ever first occurs or upon acquisition or installation for use in other plants when approved by the contracting officer, which ever first occurs. Title to other property, the cost of which is reimbursable to the contractor under this contract, shall pass to and vest in the government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract, (iii) reimbursement of the cost thereof by the government, which ever first occurs.
>
> "Title to the facilities shall not be affected by the incorporation in or attachment to any property not owned by the government nor shall any item of the facilities be or become a fixture or lose its identity as personality by reason of affixation to any realty. Except as authorized by the contracting officer, the contractor (i) shall keep the facilities free and clear of all liens and encumbrances, and (ii) shall not remove or

otherwise part with possession of, or permit the use by others of any of the facilities."

Contract 5608 provides:

> "Title and Risk of Loss—Unless otherwise provided in this order seller shall have title to and bear the risk of any loss of or damage to items purchased hereunder until they are delivered in conformity with this order at the F.O.B. point specified on the face hereof and upon such delivery title shall pass from seller and seller's responsibility for loss or damage shall cease except for loss or damage resulting from seller's negligence. Passing of title upon delivery shall not constitute acceptance of the items by buyer."

The evidence shows that approval of the government contracting officer was obtained on purchase orders for all facilities equipment procured under 5606(F) and all fixed price purchase orders under 5608 involving $10,000 (later increased to $25,000) and all contracts for the manufacture of special tooling involving a cost of over $14,000.

Under these circumstances we are called upon to decide whether or not Boeing is entitled to exemption from the payment of sales tax to the State of Alabama based upon the doctrine of sovereign immunity.

In *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 74 S.Ct. 403, 98 L.Ed. 546, the Supreme Court of the United States held invalid the imposition of the tax and distinguished that case from *King & Boozer*, supra, as follows:

"The contract here in issue differs in form but not in economic effect on the United States. The Nation bears the burden of the Arkansas tax as it did that of Alabama. The significant difference lies in this. Both the request for bids and the purchase order, in accordance with the contract arrangements making the contractors purchasing agents for the Government * * * contain this identical, specific provision:

"'3. This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The Vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof.'"

In discussing the distinction between the two cases, the Supreme Court of Tennessee in *United States of America v. Boyd*, _____ Tenn. _____, 363 S.W.2d 193, said:

"The general distinction then between these two cases is the finding of an agency relationship between the Government and the contractor for the purchase of materials in the Kern-Limerick case. This finding was based upon (1) *the terms of*

the contract, (2) *the terms of the purchase orders*, and (3) *the actual practice of the Navy to exercise its reserved right to approve each request for bids and each purchase.*" (Emphasis added.)

We think this analysis of the distinction between *King & Boozer and Kern-Limerick* correct. In fact, in *Kern-Limerick* the Supreme Court of the United States indicated that "* * * the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies * * *", at pages 122, 123 (347 U.S.)

What then, about the contracts before us? Do they contain language which would bring the case within the doctrine of *Kern-Limerick* of is the case more akin to the *King & Boozer* type of case? The trial court was persuaded that the *Kern-Limerick* line of cases was controlling. We cannot agree. We think the court overlooked the significance of that provision of the contract which clearly provided:

"The Contractor, *as an independent Contractor and not an Agent of the Government*, shall on the terms and conditions hereinafter more particularly set forth, furnish the necessary management, labor, facilities, materials, tools and equipment (except as may be furnished by the Government) and do all things necessary and/or incidental to the performance of preparatory effort toward a project of engineering, fabrication, etc. * * *." (Emphasis added.)

If the Supreme Court can be taken at its word that the form of contracts "may determine the effect of state taxation on federal agencies" then we must conclude that these contracts fail to provide for immunity from state taxation for the independent contractor. Apparently under *Kern-Limerick* there was nothing to prevent the federal government from so drawing the contracts. We think the case controlled by *Alabama v. King & Boozer*, supra. There, as here, the contract provided that title to all materials and supplies for which the contractors were "entitled to be reimbursed" should vest in the government upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance by the government officer. There the Supreme Court held that

> "* * * we think all the provisions which we have mentioned, read together, plainly contemplate that the contractors were to purchase in their own names and on their own credit all the materials required, unless the government should elect to furnish them; that the government was not to be bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site.
>
> * * *
>
> "But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the government to enter into contracts or to pledge its credit."

So, here, the contracts expressly provide that Boeing is an independent contractor and not an agent of the government. Nothing in these contracts gives to Boeing the right to obligate the government or pledge its credit in any fashion. It differs substantially from the contract in *Kern-Limerick* which expressly provided for purchase orders with the following language:

> "'This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The Vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof.'"

It is our conclusion that Boeing is not entitled to governmental immunity under the theory that it is actually an agent of the federal government in making purchases of items called for under these contracts. Paraphrasing the language of the Supreme Court of the United States in *U.S. v. Boyd*, 378 U.S. 39, at page 48, we cannot conclude that Boeing (Carbide and Ferguson in that case) a cost-plus-fixed-fee contractor for profit, has been so incorporated into the government structure as to become an instrumentality of the United States and thus enjoy governmental immunity. And again at page 50. "constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes

imposed directly on the United States". We conclude after having examined these contracts, and the record which runs well over 1,000 pages, that the trial court erred in its conclusion that "the identification between The Boeing Company and NASA, in matters of purchasing, was sufficiently close * * * to constitute NASA the real purchaser of the tangible personal property which was procured under the contracts * * * ". It follows, therefore, that the decree appealed from is reversed.

REVERSED AND REMANDED.

Livingston, C. J., Coleman and Kohn, J.J., concur.

On Rehearing

PER CURIAM.

In application and brief on rehearing the appellee asks that the court review the matter of whether the appellee, as the contractor, was the agent of the Federal Government (NASA) in purchasing the materials, equipment and supplies from the suppliers under Contracts 5608 and 5606F. Such materials, etc., were all found by this court in its opinion to have been used by the contractor, at least for a time, in performing the research and development work called for under the Contract 5608. In this respect the court feels that it has in its 24-page opinion on appeal fully considered and answered the alleged question of agency, to the effect that the purchases of the materials, etc., by the appellee from the suppliers, whether made under Contract 5608 or Contract 5606F, were made by the appellee as an independent contractor and not as an agent of the Federal

Government. The application of the appellee and brief in support thereof bring nothing new into the picture and we do not deem it necessary to give the alleged agency question any further consideration, other than to reaffirm what we have already concluded on the subject.

The appellee next asserts that we have not in the opinion answered or written to the question, or holding of the trial court, concerning the sales to the appellee, as the contractor, being allegedly sales for resale to the government, or in effect wholesale sales on the contractor level, and as such not subject to the sales tax, regardless of the question of agency. While we did not go into this proposition in as much detail as we did the other, it was considered by us along with the question of agency. The holding of the trial court on the question of sales for resale was in the opinion on appeal not only referred to by us, but also quoted in its entirety. It was also pointed out in the opinion that the State was attempting to tax in these cases only the procurement of items which were used by the appellee, however briefly, in performance of its research and development work under Contract 5608. The purchase of such items by the appellee for the purpose of its using them, even in some instances for only a brief period of time, in performing the research and development work under said contract, tends to establish that such purchases by the appellee were not for resale, but were incidental to such research and development work done by the appellee. Moreover, the entire decree of the trial court as quoted in the opinion was reversed by us.

The record in these cases leads us to further conclude that the appellee, as the independent contractor, purchased the materials, etc., from the suppliers for the purpose of using the

materials in performing Contract No. 5608, and in doing what appears to have been exclusively research and development work thereunder, insofar as such contract was performed in Alabama. The record also shows that the materials, etc., were so used by the appellee. Under the circumstances the sales to the appellee could hardly be considered to be sales for resale, or wholesale sales.

In the case of *United Aircraft Corp. v. O'Connor*, 141 Conn. 530, 107 A(2d) 398, 402, the contractor was engaged under a government contract in research engineering and experimental work for the United States Navy and Air Force, in an attempt to develop more efficient aircraft motors. The Connecticut Supreme Court held that the purchases of materials by the contractor, to be used by it in performing such work, were not for resale, even though some of the experimental aircraft motors involved were actually delivered to the government by the contractor. Such deliveries were said not to be sales by the contractor to the government, but were held to be merely incidental to the special or professional services rendered by the contractor.—See also *Snite v. Department of Revenue*, 398 Ill. 41, 45, 74 N.E. 877; note 139 A.L.R. 372, 381; and *Haden v. McCarty*, 275 Ala. 76, 152 So.(2d) 141.

The case of *United Aircraft v. Connelly*, 145 Conn. 176, 107 A(2d) 398, cited by the appellee, is distinguishable from these cases and also the cased above cited, including the *O'Connor* case. In the *Connelly* case the contractor was found to be actually engaged in manufacturing and selling certain personal property *as such* to the government, rather than performing exclusively professional services or research and development.

There being no further proceedings necessary, the decree of the trial court is hereby REVERSED AND A DECREE RENDERED in accordance with the opinion.

Opinion modified and extended and application overruled.

Livingston, C.J., Simpson, Coleman and Kohn, J.J. concur.

APPENDIX C

FINAL JUDGMENT AND DECREE OF THE SUPREME COURT OF ALABAMA

NOVEMBER 7, 1968

THE STATE OF ALABAMA--------JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM 1968-69

3 Div. 309
thru 326

Phillip Hamm, as Commissioner of Revenue
of the State of Alabama

v.

The Boeing Company, a Corporation
Appeal from Montgomery Circuit Court

The appellee having filed an application for rehearing in this cause on October 18, 1968, and the opinion and the judgment of this Court, dated October 3, 1968, being further examined,

IT IS CONSIDERED AND ORDERED that the judgment of this Court, dated October 3, 1968, should be modified by rendering in this Court the judgments that the Circuit Court should have rendered.

IT IS THEREFORE ORDERED AND ADJUDGED that the judgments of the Circuit Court in each of said causes be reversed and annulled; and this Court, proceeding to render the

judgments that the Circuit Court should have rendered, does hereby determine, order and adjudge that the sales tax collected from the plaintiff under protest in each of these cases was legally and validly collected, and that no part thereof is due to be refunded to plaintiff.

IT IS FURTHER ORDERED AND ADJUDGED that The Boeing Company, a Corporation, pay the costs of the proceedings in each of the causes below, in addition to the costs accruing on said appeals in this Court and in the Court below, all of which costs let execution issue.

IT IS FURTHER ORDERED that the appellee's application for rehearing be, and the same is hereby overruled.

APPENDIX D

STATUTE INVOLVED

Acts of Alabama, 1959 Volume I, page 298 (Act No. 100 of The Second Special Session):

Section 1. Definitions.–(1) The following words, terms and phrases, when used in this Act, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) The term "person" or the term "company" herein used interchangeably, includes any individual, firm, co-partnership, association, corporation, receiver, trustee or any other group or combination acting as a unit and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

(b) The term "department" means the department of revenue of the state of Alabama.

(c) The term "commissioner" means the commissioner of revenue of the state of Alabama.

(d) The term "tax year" or "taxable year" means the calendar year.

(e) The term "sale" or "sales" includes installment and credit sales and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale.

(f) The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal

property (and including the proceeds from the sale of any property handled on consignment by the taxpayer), including merchandise of any kind and character without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatsoever, and without any deductions on account of losses; provided that cash discounts allowed and taken on sales shall not be included, and "gross proceeds of sales" shall not include the sale price of property returned by customers when the full sales price thereof is refunded either in cash or by credit. Said term "gross proceeds of sale" shall also mean and include the reasonable and fair market value of any tangible personal property previously purchased at wholesale which is withdrawn or used from the business or stock and used or consumed in connection with said business, and shall also mean and include the reasonable and fair market value of any tangible personal property previously purchased at wholesale which is withdrawn from the business or stock and used or consumed by any person so withdrawing the same, except property which has been previously withdrawn from such business or stock and so used or consumed with respect to which property the tax has been paid because of such previous withdrawal, use or consumption, and except property which enters into and becomes an ingredient or component part of tangible personal property or products manufactured or compounded for sale and not for the personal and private use or consumption of any person so withdrawing, using or consuming the same.

(g) The word "taxpayer" means any person liable for taxes hereunder.

(h) The term "gross receipts" means the value proceeding or accruing from the sale of tangible personal property,

including merchandise and commodities of any kind and character, all receipts actual and accrued, by reason of any business engaged in (not including, however, interest, discounts, rentals of real estate or royalties) and without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, or any other expenses whatsoever and without any deductions on account of losses. Said term "gross receipts" shall also mean and include the reasonable and fair market value of any tangible personal property previously purchased at wholesale which is withdrawn or used from the business or stock and used or consumed in connection with said business, and shall also mean and include the reasonable and fair market value of any tangible personal property previously purchased at wholesale which is withdrawn from the business or stock and used or consumed by any person so withdrawing the same, except property which has been previously withdrawn from such business or stock and so used or consumed and with respect to which property the tax has been paid because of, such previous withdrawal, use or consumption, and except property which enteres into and becomes an ingredient or component part of tangible personal property or products manufactured or compounded for sale and not for the personal and private use or consumption of any person so withdrawing, using or consuming the same.

(i) The term "wholesale sale" or "sale at wholesale" means a sale of tangible personal property by wholesalers to licensed retail merchants, jobbers, dealers, or other wholesalers for resale and does not include a sale by wholesalers to users or consumers, not for resale. The term "wholesale sale" shall include a sale of tangible personal property or products (including iron ore) to a manufacturer or compounder which enters into and becomes an ingredient or component part of the

tangible personal property or products which he manufactures or compounds for sale, and the furnished container and label thereof. The term "wholesale sale" or "sale at wholesale" shall also include a sale of containers intended for one-time use only, and the labels thereof, when such containers are sold without contents to persons who sell or furnish such containers along with the contents placed therein for sale by such persons. Moreover, such terms include a sale to a manufacturer or compounder, of crowns, caps, and tops intended for one-time use employed and used upon the containers in which he markets his products; but such terms do not include a sale of re-usable containers which in the usual and ordinary course and manner of doing business are repurchased or otherwise recovered for re-use.

(j) The term "sale at retail" or "retail sale" shall mean all sales of tangible personal property except those above defined as wholesale sales. The quantities of goods sold or prices at which sold, are immaterial in determining whether or not a sale is at retail. Sales of building materials to contractors, builders, or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. Sales of tangible personal property or products to manufacturers, quarry operators, mine operators, or compounders, which are used or consumed by them in manufacturing, mining, quarrying or compounding and do not become an ingredient or component part of the tangible personal property manufactured or compounded are retail sales. The term "sale at retail" or "retail sale" shall also mean and include the withdrawal, use or consumption of any tangible personal property by anyone who purchases same at wholesale, except property which has been previously withdrawn from the business or stock and so used or consumed and with respect to

which property the tax has been paid because of such previous withdrawal, use or consumption, and except property which enters into and becomes an ingredient or component part of tangible personal property or products manufactured or compounded for sale and not for the personal and private use or consumption of any person so withdrawing, using or consuming the same; and such wholesale purchaser shall report and pay the taxes thereon.

(k) The word "business" as used in this Act, shall include all activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit or advantage, either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls.

(l). The term "automotive vehicle" shall include a power shovel, dragline, crawler, crawler crane, ditcher, or any similar machine which is self-propelled, in addition to self-propelled machines which are used primarily as instruments of conveyances.

(m) The use within this state of tangible personal property by the manufacturer thereof, as building materials, in the performance of a construction contract, shall, for the purposes of this Act be considered as a retail sale thereof by such manufacturer, who shall also be construed as the ultimate consumer of such materials or property, and who shall be required to report such transaction and pay the sales tax thereon, based upon the reasonable and fair market price thereof at the time and place where same are used or consumed by him or it. The provisions of this subsection shall not apply to

any tangible personal property which is specifically exempted from the tax levied in this Act.

(n) A sale of lumber by a lumber manufacturer to a trucker for resale is a sale at wholesale as such sales are defined herein where the trucker is either a licensed dealer in lumber or, if a resident of Alabama has registered with the department of revenue and has received therefrom a certificate of such registration or, if a non-resident of this state purchasing lumber for resale outside of Alabama, has furnished to the lumber manufacturer his name, address and the vehicle license number of the truck in which the lumber is to be transported, which name, address and vehicle license number shall be shown on the sales invoice rendered by the lumber manufacturer. The certificate provided for herein shall be valid for the calendar year of its issuance and may be renewed from year to year on application to the department of revenue on or before the thirty-first day of January of each succeeding year; provided, however, that if not renewed the certificate shall become invalid for the purpose of this Act on the first day of February.

Section 2. There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the application of rates against gross sales, or gross receipts, as the case may be, as follows:

(a) Upon every person, firm, or corporation, (including the State of Alabama and its Alcoholic Beverage Control Board in the sale of alcoholic beverages of all kinds, the University of Alabama, Alabama Polytechnic Institute and all other institutions of higher learning in the state, whether such

institutions be denominational, state, county or municipal institutions, and any association or other agency or instrumentality of such institutions) engaged, or continuing within this state, in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character, (not including, however, bonds or other evidences of debts or stocks), an amount equal to three percent of the gross proceeds of sales of the business except where a different amount is expressly provided herein. Provided, however, that any person engaging or continuing in business as a retailer and wholesaler or jobber shall pay the tax required on the gross proceeds of retail sales of such business at the rates specified, when his books are kept so as to show separately the gross proceeds of sales of each business, and when his books are not so kept he shall pay the tax as a retailer, on the gross sales of the business.

(b) Upon every person, firm or corporation engaged, or continuing within this state, in the business of conducting, or operating, places of amusement or entertainment, billiard and pool rooms, bowling alleys, amusement devices, musical devices, theaters, opera houses, moving picture shows, vaudevilles, amusement parks, athletic contests, including wrestling matches, prize fights, boxing and wrestling exhibitions, football and baseball games, (including athletic contests conducted by or under the auspices of any educational institution within this state, or any athletic association thereof, or other association whether such institution or association be a denominational, a state, or county, or a municipal institution or association or a state, county, or city school, or other institution, association or school), skating rinks, race tracks, golf courses, or any other place at which any exhibition, display, amusement or

entertainment is offered to the public or place or places where an admission fee is charged, including public bathing places, public dance halls of every kind and description within the state of Alabama, an amount equal to three percent of the gross receipts of any such business.

(c) Upon every person, firm or corporation engaged or continuing within this state in the business of selling at retail machines used in mining, quarrying, compounding, processing and manufacturing of tangible personal property, and the parts of such machines, attachments and replacements therefor which are made or manufactured for use on or in the operation of such machines, and which are necessary to the operation of such machines and are customarily so used, an amount equal to one and one-half percent of the gross proceeds of the sale of such machines, attachments, parts and replacements therefor.

(d) Upon every person, firm or corporation engaged or continuing within this state in the business of selling at retail any automotive vehicle or truck trailer and semi-trailer, an amount equal to one and one-half percent of the gross proceeds of the sale of said automotive vehicle or truck trailer and semi-trailer.

Where any used automotive vehicle or truck trailer or semi-trailer is taken in trade, or in a series of trades, as a credit or part payment on the sale of a new or used vehicle, the tax levied herein shall be paid on the net difference, that is, the price of the new or used vehicle sold less the credit for the used vehicle taken in trade.

Section 3. There are exempted from the provisions of this Act and from the computation of the amount of the tax levied,

assessed or payable under this Act the gross proceeds of sales of tangible personal property or the gross receipts of any business which the state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state.

Section 4. If any person, on or after October 1, 1959, shall engage in or continue in any business for which a privilege tax is imposed by Section 2 of this Act, as a condition precedent to engaging or continuing in such business, he shall apply for and obtain from the department a license to engage in and to conduct such business for the current tax year upon the condition that he shall pay the taxes accruing to the state of Alabama under the provisions of this Act, provided, however, that no license shall be issued under the provisions of this Act to any person who has not complied with the provisions of this Act, and no provision of this Act shall be construed as relieving any person from the payment of any license or privilege tax now or hereafter imposed by law.

Section 5. The taxes levied under the provisions of this Act, except as otherwise provided, shall be due and payable in monthly installments on or before the twentieth day of the month next succeeding the month in which the tax accrues. On or before the twentieth day of each month after this Act shall have taken effect, every person on whom the taxes levied by this Act are imposed, shall render to the department of revenue on a form prescribed by the department, a true and correct statement showing the gross sales, the gross proceeds of sales, or gross receipts of his business, as the case may be, for the next preceding month, the amount of gross proceeds or gross receipts which are not subject to the tax, or are not to be used as a measurement of the taxes due by such person, and the nature

thereof, together with such other information as the department may demand and require, and at the time of making such monthly report such person shall compute the taxes due and shall pay to the department of revenue the amount of taxes shown to be due. Provided, however, that when the total tax for which any person liable under this Act does not exceed ten dollars, for any month, a quarterly return and remittance in lieu of the monthly returns may be made on or before the twentieth day of the month next succeeding the end of the quarter for which the tax is due, when specially authorized by the department of revenue, and under such rules and regulations as may be prescribed. The department of revenue, for good cause, may extend the time for making any return required under the provisions of this Act, but the time for filing any such return shall not be extended for a period greater than thirty days from the date such return is due to be made.

Section 6. Any person taxable under this Act, having cash and credit sales, may report such cash sales, and the taxpayer shall thereafter include in each monthly report all credit collections made during the month preceding, and shall pay the taxes due thereon at the time of filing such report, but in no event shall the gross proceeds of credit sales be included in the measure of the tax to be paid until collections of such credit sales shall have been made.

Section 7. It shall be the duty of every person engaging, or continuing, in this state in any business for which a privilege tax is imposed by this Act, to keep and preserve suitable records of the gross sales, gross proceeds of sales and gross receipts or gross receipts of sales of such business and such other books or accounts as may be necessary to determine the amount of tax

for which he is liable, under the provisions of this Act. And it shall be the duty of every person to keep and preserve, for a period of three years, all invoices of goods, wares and merchandise purchased, for resale or otherwise, and all such books, invoices and other records shall be open for examination at any time, by the department, or its duly authorized agent. Any person selling both at wholesale and retail shall keep his books so as to show separately the gross proceeds of wholesale sales and the gross proceeds of retail sales.

Section 8. The monthly reports herein required to be made are not required to be made on oath but wherever in this Act any report is required to be sworn to, the same shall be sworn to by the taxpayer or his agent before some officer authorized to administer oaths, and any false statement to a material fact made with intent to defraud, shall constitute perjury, and upon conviction thereof the person so convicted shall be punished as provided by law.

Section 9. Any person subject to the provisions of this Act who shall fail to make the reports or any of them, as herein required, or who shall fail to keep the records as herein required, shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five dollars, nor more than five hundred dollars, for each offense. Each month of such failure shall constitute a separate offense.

Section 10. Any person subject to the provisions of this Act wilfully refusing to make the reports herein required, or who shall refuse to permit the examination of his records by the department of revenue, or its duly authorized agents, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars, nor more than five hundred dollars for

each offense, and in addition may be imprisoned in the county jail for a period not to exceed six months. Each month of failure to make such reports shall constitute a separate offense, and each refusal of a written demand of the department to examine, inspect or audit such records shall constitute a separate offense.

Section 11. As soon as practicable after the return is filed the department shall examine it and ascertain the proper amount of the tax due as shown by the return. If the amount paid is greater than the amount due, as shown by the return, the excess shall be refunded to the taxpayer, or credited on any deficiency previously due by the taxpayer, in accordance with law and under such rules and regulations as the department may adopt and promulgate. If the amount paid is less than the amount due, as shown by the return, the department shall immediately notify the taxpayer of such deficiency and shall add thereto a penalty of ten percent of the amount due, and if such deficiency be not paid within thirty days from the date of such notice, the same shall bear interest at the rate of one-half of one percent per month, or fraction thereof, from the date the same was due which shall be collected as a part of the tax; provided, the department, if a good and sufficient reason is shown, may waive or remit the penalty of ten percent or a portion thereof.

Section 12. Any person who fails to pay the tax herein levied within the time required by this Act shall pay, in addition to the tax, a penalty of ten percent of the amount of tax due, together with interest thereon at the rate of one-half of one percent per month, or fraction thereof, from the date at which the tax herein levied became due and payable, such penalty and

interest to be assessed and collected as a part of the tax. Provided the department, if a good and sufficient reason is shown, may waive or remit the penalty of ten percent or a portion thereof.

Section 13. If any taxpayer fails to make the returns herein required, the department shall issue written notice, by registered mail, to such taxpayer to make such returns forthwith, and if such taxpayer fails or refuses to make such return, or returns, within thirty days from the date of such notice, then the department shall make return for such delinquent taxpayer upon such information as it may reasonably obtain, and shall assess the taxes due thereon, and shall add a penalty for failure to make such return and payment of twenty-five percent of the tax due, as assessed by the department, and interest at the rate of one-half of one percent per month, or fraction thereof, from the date such taxes were due. Provided the department, if a good and sufficient reason is shown for such delinquency, may waive or remit the twenty-five percent penalty, or a portion thereof.

Section 14. Whenever the department, in examining and auditing the records of any taxpayer, or from other information, shall ascertain that the amount, or amounts, previously paid by any taxpayer for any period, or periods, is incorrect, the department shall compute the correct amount of tax due, and if it appears that the amount paid by the taxpayer is in excess of the correct amount due, such excess shall be refunded to the taxpayer in accordance with law and under the rules and regulations of the department. It if appears that the amount paid by such taxpayer is less than the amount due, the department shall compute the amount of such deficiency and

shall notify the taxpayer, and shall demand payment therefor. If the amount demanded is not paid within ten days from the date of such demand, or if the taxpayer does not request an extension of time within ten days from the date of such demand, the department shall make an assessment against the taxpayer of the amount due and shall add a penalty of one-half of one percent per month from the date such taxes or any part thereof became due. Provided, that the department may, if a good and sufficient reason is shown, waive or remit the penalty or a portion thereof. If within ten days from the date of notice of a deficiency the taxpayer requests in writing an extension of time, the department shall grant an extension of thirty days. If at the end of such extended period, the deficiency has not been paid, the department shall proceed with the assessment. Provided that if the department be of the opinion that there was a wilful or fraudulent intent by the taxpayer to evade the tax due, it may assess a penalty of twenty-five percent of the tax. Provided that upon appeal such action shall be reviewable.

Section 15. Whenever the department shall make an assessment against a taxpayer as herein provided, the department shall notify the taxpayer by registered or certified mail of the amount of such assessment, and shall notify the taxpayer to appear before the department on a day named not less than twenty days from date of such notice and show cause why such assessment should not be made final. Such appearance may be made by agent or attorney. If no showing is made on or before the date fixed in such notice, or if such showing is not sufficient in the judgment of the department, such assessment shall be made final in the amount originally fixed or in such other amount as is determined by the department to be correct. If upon such hearing the department finds the amount due to

be different from that originally assessed, it shall make the assessment final in the correct amount and in all cases shall notify the taxpayer of the assessment as finally fixed. Provided a notice by United States mail addressed to the taxpayer's last known place of business shall be sufficient. Any assessment made by the department shall be prima facie correct upon appeal.

Section 16. (a) Whenever any taxpayer, who has duly appeared and protested an assessment by the department, is dissatisfied with the assessment as finally made, he may appeal in all respects in the same manner provided by Section 140 of Title 51, Code of Alabama 1940. Provided, no appeal shall lie in cases where the taxpayer has failed to appear and protest.

(b) No assessment shall be made by the department of revenue against any person, firm or corporation for any tax which became due from such person, firm, or corporation under the provisions of this Act more than three years prior to the date the department commenced an audit of the books or records of such person, firm, or corporation to ascertain the amount due, or, if no audit is made, prior to the date the department mailed written demand for the amount claimed to be due from such person, firm, or corporation.

Section 17. The tax together with interest and penalties imposed by this Act shall be a lien upon the property of any person subject to the provisions of this Act, and the provisions of the revenue laws of the State of Alabama applying to liens for license taxes shall apply fully to the taxes herein levied.

Section 18. If any final assessment of taxes herein levied be not paid within thirty days after such assessment becomes final if no appeal has been taken, in cases where an appeal is authorized, the department shall issue an execution therefor directed to any sheriff of the state of Alabama commanding him to levy upon and sell the real and personal property of the person against whom such execution is directed, found in his county, together with all penalties assessed. The sheriff shall within five days after the receipt thereof file with the clerk of the circuit court of his county a copy thereof, and thereupon the circuit clerk shall enter in the judgment roll, in the column of judgment debtors, the name of the taxpayer named in the execution, the amount of the tax, and damages and penalties for which the execution is issued, and the day when such copy is filed; thereupon the amount of such execution so docketed shall become a lien upon the real and personal property of the person against whom it is issued in the same manner as judgments duly enrolled from the circuit court or court of like jurisdiction.

The sheriff thereupon shall levy upon any property of the taxpayer with like effect and in the manner prescribed by law in respect to execution issued upon judgments of the circuit court or court of like jurisdiction, and the remedies of attachment and garnishment shall apply fully to such execution, and the officer shall be entitled to the same fees for his services as now allowed by law for like services to be collected in the same manner as now provided by law for like services. The sheriff shall make due return of such execution within sixty days of the issuance thereof to the department and upon such return alias or pluries executions may be issued by the department which shall be executed in the same manner. Such lien shall not

be valid against my mortgagee, purchaser, or judgment creditor until notice has been filed in the office of the judge of probate as provided for under Section 883 of Title 51, Code of Alabama 1940.

Section 19. The tax herein levied shall constitute a debt due the state of Alabama and may be collected by civil suit, in addition to the methods herein provided, brought at any time within three years after the tax has become due and payable.

Section 20. The department of revenue may summon before it any taxpayer and any officer or employee of any taxpayer, liable for taxes under this Act or any other witnesses, swear and examine them with regard to any facts showing the amount of taxes levied by this Act due by such persons, and the department, or its duly authorized representatives and agents shall be allowed to examine any books, papers, or documents of the taxpayer, and if any taxpayer shall refuse to allow such examination to be made in his main office or principal place of business in Alabama, the department may require the production, before it at the courthouse in the county of Alabama where the taxpayer has his main office or principal place of business, of any books, papers, invoices, or documents. The summons of witnesses to appear before it, or the notice to the taxpayer to produce books, papers, invoices, or documents before it, may be issued by the department of revenue, signed by the secretary, and such summons or notice shall be directed to any sheriff of the State of Alabama, and must be served by any sheriff to whom such summons or notice is delivered by the department for services. The department or any authorized agent is given full authority to inspect or examine, during business hours at the office of the taxpayer where its books are

kept, or if said books are kept outside of the state, then at the office outside of the state where such books are kept by the taxpayer, all books, papers, invoices, or documents of said taxpayer shedding any light on the amount of taxes levied by this Act due by such person. Any person who wilfully fails to appear before the department after having been summoned as a witness, or having appeared refuses to testify as to any material matters required of him by the department, or any taxpayer or his agent who refuses to produce before the department after notice given him, any books, papers, invoices, or documents required to be produced, or any taxpayer or agent thereof in custody of the books, papers, invoices, or documents, and any taxpayer who refuses to allow the department or any authorized agent thereof to inspect or examine said books, papers, invoices, or documents at the office of such taxpayer, where said books are kept during business hours, shall be guilty of contempt and upon a certificate of the facts to a circuit judge of the county where the taxpayer has his principal place of business or where his books are kept, it shall be the duty of such circuit judge to adjudge such taxpayer or his agent in contempt, and shall subject such taxpayer or his agent to a fine not exceeding fifty dollars and imprisonment in the county jail for a period not exceeding five days. Provided that each said refusal to appear or upon appearance each refusal to testify, or each said refusal to produce books, papers, invoices, or documents required, or each refusal to allow the examination of such books, records, invoices, or documents, either or all, shall constitute a separate offense.

Section 21. If the department finds that a person liable for tax under any provisions of this Act designs quickly to depart from the state or to remove his property therefrom, or to

conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect such tax unless such proceedings be brought without delay, the department shall cause notice of such finding to be given such person, together with a demand for an immediate return and immediate payment of such tax. Thereupon such tax shall become immediately due and payable. If such person is not in default in making such return or paying any tax prescribed by this Act, and furnishes evidence satisfactory to the department under regulations to be prescribed by the department, that he will duly return and pay the tax to which the department's finding relates, then such tax shall not be payable prior to the time otherwise fixed for payment. If such person fails to appear and make such showing then the department shall make such assessment final and execution may immediately issue as it is herein provided.

Section 22. For the purpose of securing the payment of any tax, penalties, or interest due or which may become due under the provisions of this Act, every itinerant vendor engaged in the business of selling tangible personal property at retail in this state is required to file a bond with the department conditioned upon the payment of any tax, penalty or interest due or to become due under the Act, and upon faithful observance of the provisions of the Act. Such bond shall be effective for a period of one year from date of issuance and shall be in an amount not less than one hundred dollars nor more than one thousand dollars to be fixed by the department equal to the amount of tax estimated due or to become due under the provisions of this Act, and shall have a surety or sureties satisfactory to the department. It shall be filed with the department within ten days after notice in writing has been issued by the commissioner or any person designated by him in writing for this purpose, and sent by registered or certified mail to the last known address of any itinerant vendor or has been

personally served upon him by a duly accredited representative of the department. If such itinerant vendor fails to make any return due under this Act or to pay any taxes or penalties due under this Act, or to keep books and records as required by this Act, or fails to perform any other duty or obligation imposed on him under this Act, such bond shall thereupon be forfeited, and the department shall institute suit upon such bond in the name of the state of Alabama for the entire amount of said bond and costs.

Section 23. Any person subject to the provisions hereof who shall sell out his business or stock of goods, or shall quit business, shall be required to make out the return provided for under Section 5 of this Act within thirty days after the date he sold out his business, or stock of goods, or quit business, and his successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the department showing that the taxes have been paid, or a certificate that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided the taxes shall be due and unpaid after the thirty-day period allowed, he shall be personally liable for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner. If in such cases the department deems it necessary in order to collect the taxes due the state it may make a jeopardy assessment as herein provided.

Section 24. Every person, firm, corporation, association or co-partnership engaged in or continuing within this state in the business for which a license or privilege tax is required by this Act shall add to the sales price and collect from the purchaser on all sales upon the gross receipts or gross proceeds of which there is levied by this Act a sales tax at the rate of three

percent, three cents tax for each whole dollar of sales price. Provided, however, on that part of the sales price which is a fractional part of a dollar, in addition to whole dollars, and on sales of less than a dollar there shall be collected in addition to the tax collected on whole dollars, no tax on one cent to and including ten cents of sales price, one cent tax on eleven cents to and including forty cents of sales price, two cents tax on forty-one cents to and including seventy-five cents of sales price, three cents tax on seventy-six cents to and including ninety-nine cents of sales price. Upon all sales the gross receipts or gross proceeds of which are taxed by this Act at a rate less than three percent, there shall be added to the sales price and collected from the purchaser by such person, firm, corporation, association, or co-partnership described in this section an amount equal to the prescribed percentage of such sales price. It shall be unlawful for any person, firm, corporation, association, or co-partnership described in this section to fail or refuse to add to the sales price and collect from the purchaser the amount required by this Section to be so added to the sales price and collected from the purchaser; and it shall likewise be unlawful to refund or offer to refund all or any part of the amount collected, or to absorb or advertise directly or indirectly the absorption or refund of the amount required to be added to the sales price and collected from the purchaser, or any portion of such amount. Any person, firm, corporation, association, or co-partnership violating any of the provisions of this Section shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than fifty dollars nor more than one hundred dollars, or may be imprisoned in the county jail for not more than six months or by both such fine and imprisonment, and each Act in violation of the provisions of this Act shall constitute a separate offense. The provisions of this Section that there shall be added to the sales price and collected from the purchaser the amounts provided

herein shall in no way relieve the person, firm, corporation, association or co-partnership described in this section of the tax levied by this Act; nor shall the inability, impracticability, refusal, or failure to add to the sales price and collect from the purchaser the amounts provided herein relieve such person, firm, corporation, association, or co-partnership from the tax levied by this Act. All taxes paid in pursuance to this Act or any other statute enacted in this connection shall conclusively be presumed to be a direct tax on the retail consumer, pre-collected for the purpose of convenience and facility only.

Section 25. Any taxpayer who shall violate any of the provisions of this Act may be restrained from continuing in business, and the proper prosecution shall be instituted in the name of the State of Alabama by its attorney general, by the counsel of the department or under their direction by any circuit solicitor of the state until such person shall have complied with the provisions of this Act.

Section 26. The tax imposed by this Act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this Act otherwise specifically provided.

Section 27. (a) Unless in accordance with a judicial order or as herein provided, the department, its agents, clerks, or stenographers shall not divulge the gross receipts, gross proceeds of sales, or the amount of tax paid by any person as shown by the reports filed under the provisions of this Act, except to employees of the department for the purpose of checking, comparing, and correcting returns, or to the governor, or to the attorney general, or any other legal representative of the state in any action in respect to the amount of tax due under the provisions of this Act.

(b) Any duly authorized agent of the tax collecting authority of any municipality or county of this state shall have access at any reasonable time upon the written request by the governing body of such municipality or county to the information contained in the sales tax returns, statements, or information secured by the department of revenue officials or employees, for the purpose of arriving at the amount of any tax due from any person, firm, or corporation, if such person, firm, or corporation is liable for, or if there is probable cause for believing such person, firm, or corporation might be liable for the payment of any tax to such municipality or county.

(c) Any duly authorized tax collecting authority desiring to secure the information as set out in subsection (b) above shall petition the governing body of such municipality or county of this state to secure such information. Such governing body shall, after the passage of a proper resolution requesting such information, make written request to the commissioner of revenue of the State of Alabama for the required information and shall attach to such written request a copy of said resolution.

(d) The commissioner of revenue of the State of Alabama shall have authority to promulgate reasonable rules and regulations governing the release of the information as provided in subsection (b) above.

(e) It shall be unlawful for any person to use the information obtained in accordance with subsection (b) above for any purpose other than ascertaining the amount of the taxes due the municipality or county. Any person violating the provisions hereof shall be guilty of a misdemeanor and upon conviction thereof shall be punished according to law.

Section 28. The administration of this Act is vested in and s ll be exercised by the department of revenue, except as otherwise herein provided, and the enforcement of any of the provisions of this Act in any of the courts of the state shall be under the jurisdiction and supervision of the department, and the department may require the assistance of, and act through the prosecuting attorney, or deputy solicitor of any county, or any circuit solicitor, and the attorney general of the state, and any legal counsel of the department of revenue. The department shall appoint as needed such agents, clerks, and stenographers as may be necessary to enforce provisions of this Act, under the provisions of the merit system, who shall perform such duties as may be required, and such duly appointed and qualified agents are authorized to act for the department as it may direct and as is authorized by law.

Section 29. The department shall from time to time promulgate such rules and regulations for making returns and for ascertainment, assessment and collection of the tax imposed hereunder as it may deem necessary to enforce its provisions; and upon request shall furnish any taxpayer with a copy of such rules and regulations. The department may adopt rules and regulations providing for the issuance of permits to manufacturers to purchase tangible personal property without the payment to the vendor of the sales tax, and providing for such manufacturer to report and pay such tax directly to the department, in instances where the department determines that it is practically impossible at the time of purchase for such manufacturer or his vendors to determine with any degree of certainty the applicability of such tax, and that such provisions will facilitate and expedite the collection of the tax which may be due from such consumer; and such provisions may also be made applicable to persons engaged in the business of mining,

quarrying, compounding, or processing tangible personal property, railroads, transportation companies, and others.

Section 30. If upon examination by the department, it is determined that an amount of tax has been paid in excess of that properly due, than the amount in excess shall be credited against any amount thereof then due from the taxpayer, and any balance of such excess shall be refunded to the taxpayer by certificate of over-payment issued by the department of the comptroller. Upon approval of such certificate by the comptroller, he shall issue his warrant on the treasurer for the amount shown by such certificate. Any taxes recovered by suit by any taxpayer shall be refunded in like manner, but shall be accompanied by a copy of the order or decree of the court issuing such order or decree.

Section 31. All taxes or other funds received or collected by the department under the provisions of this Act shall be without delay deposited in the treasury.

Section 32. Such amount of money as shall be appropriated for each fiscal year by the legislature to the department of revenue with which to pay the salaries, the cost of operation and management of said department shall be deducted, as a first charge thereon, from the taxes collected under the provisions of this Act; provided, however, that the expenditure of said sum so appropriated shall be budgeted and allotted pursuant to Title 55, Article 3, Chapter 4, of the Code of Alabama 1940, and limited to the amount appropriated to defray the expenses of operating said department for each fiscal year. After the payment of the expenses, so much of the amount remaining as may be necessary, after first applying all sums of money received by reason of the application of the surplus in the

income tax as provided by Section 424, Title 51, Code of Alabama 1940, for the replacement in the public school fund of the three-mill constitutional levy for schools and in the general fund of the one-mill levy for soldiers' relief and the two and one-half mills for general purposes lost by exemption of homestead provided for in this Act shall be first charges against the proceeds of said licenses, taxes, or receipts levied or collected under this Act. The comptroller, with the approval of the governor, is hereby directed to draw his warrants payable out of the total proceeds of said licenses, taxes or receipts levied or collected under this Act as herein provided in such sum as shall be found necessary to take care of and replace the three-mill constitutional school levy, the one-mill soldiers' relief levy and the two and one-half mill levy for general purposes of the state ad valorem taxes lost as above set forth. If the amounts of such collections in any fiscal year, remaining after the payment of the expenses of administration and replacement of the amounts in the several funds as herein provided, is equal to four million, two hundred thousand dollars, then the sum of three hundred seventy-eight thousand dollars shall be paid into the treasury to the credit of the sixty-seven counties of the state, to be divided and distributed as hereinafter provided. If the amount of such collections in any fiscal year, remaining after the payment of expenses of administration, and the replacement of the amounts in the several funds derived from the state six and one-half mill tax, as herein provided, is less than four million, two hundred thousand dollars, then an amount equal to nine percent thereof shall be paid into the treasury to the credit of the sixty-seven counties of the state to be divided and distributed as hereinafter provided. The amount deposited to the credit of the sixty-seven counties as above provided (which in no one fiscal year shall exceed nine percent

of the amount of collections remaining after the payment of the expenses and charges herein first required to be paid, nor shall it in any event exceed the sum of three hundred, seventy-eight thousand dollars for any one fiscal year) shall be divided and distributed as follows: One-half of said proceeds shall be divided and distributed proportionately among the sixty-seven counties of the state according to the population of the said counties as shown by the last federal census as proclaimed, published, or certified by the director of the bureau of the census; and one-half of said proceeds shall be divided or distributed equally among sixty-seven counties; provided that the funds divided and distributed to the several counties of the state as hereinabove provided for shall be used exclusively for full-time health service in cooperation with the state board of health or the federal government; and for extension services in cooperation with the Alabama agricultural extension service or the federal government, at the discretion of the commissioners court, boards of revenue, or other governing bodies of the several counties of the state. If the amounts of such collections in any fiscal year, after the payment of the expenses of administration and replacement of the amounts in the several funds as herein provided, is equal to four million, two hundred thousand dollars, then the sum of six hundred, seventy-two thousand dollars shall be paid into the treasury to the credit of the state department of public welfare to be used for general welfare purposes. If the amount of such collections in any fiscal year, remaining after the expenses of administration and the replacement of the amounts in the several funds derived from the state's six and one-half mills tax, as herein provided, is less than four million, two hundred thousand dollars, then an amount equal to sixteen percent thereof shall be paid into the treasury to the credit of the state department of public welfare

to be used for general welfare purposes. If the amount of such collections in any fiscal year, remaining after the payment of the expenses of administration and replacement of the amounts in the several funds as hereinabove provided and distributed is greater than four million, two hundred thousand dollars, then an amount equal to one-fourth of such excess shall be paid into the treasury to the credit of the state department of public welfare to be used for old age assistance exclusively; provided, however, that this one-fourth of such excess shall not exceed the sum of six hundred, fifty thousand dollars per annum. The amount of the proceeds of all taxes levied by this Act remaining after the payment of the expenses of administration and enforcement and the replacement in the several funds of the amount lost by any homestead exemptions and the distribution to the sixty-seven counties as herein provided shall be paid into the Alabama special educational trust fund.

Section 33. There are exempted from the provisions of this Act and from the computation of the amount of the tax levied, assessed or payable under this Act the following:

(a) The gross proceeds of the sales of lubricating oil and gasoline as defined in Sections 630 and 646 of Title 51, Code 1940, which are otherwise taxed.

(b) The gross proceeds of the sale, or sales, of fertilizer. The word "fertilizer" shall not be construed to include cottonseed meal, when not in combination with other materials.

(c) The gross proceeds of the sale, or sales, of seeds for planting purposes and baby chicks and poults. Nothing herein shall be construed to exempt, or exclude from the computation of the tax levied, assessed or payable, the gross proceeds of the

sale or sales of plants, seedlings, nursery stock or floral products.

(d) The gross proceeds of sales of insecticides and fungicides and feed for livestock and poultry (but not including prepared food for dogs or cats).

(e) The gross proceeds of sales of all livestock by whomsoever sold; and also the gross proceeds of poultry and other products of the farm, dairy, grove or garden, when in the original state or production or condition of preparation for sale, when such sale or sales are made by the producer or members of his immediate family or for him by those employed by him to assist in the production thereof. Nothing herein shall be construed to exempt or exclude from the measure or computation of the tax levied, assessed or payable hereunder, the gross proceeds of sales of poultry or poultry products when not products of the farm.

(f) Cottonseed meal exchanged for cottonseed at or by cotton gins.

(f-1) The gross receipts from the business on which, or for engaging in which a license or privilege tax is levied by or under the provisions of Sections 177-180, 182-184, and 186 of Title 51, Code of Alabama 1940. Provided, however, that nothing contained in this subsection shall be construed to exempt or relieve the person or persons operating the business enumerated in said Sections from the payments of the tax levied by this bill upon or measured by the gross proceeds of sales of any tangible personal property (except gas and water, the gross receipts from the sale of which are the measure of the tax levied by said

Section 177) merchandise or other tangible commodities sold at retail by said persons, unless the gross proceeds of sale thereof are otherwise specifically exempted by the provisions of this bill.

(f-2) The gross proceeds of sales or gross receipts, of or by, any person, firm or corporation, from the sale of transportation, gas, water or electricity, of the kinds and natures, the rates and charges for which, when sold by public utilities, are customarily fixed and determined by the public service commission of Alabama or like regulatory bodies.

(g) The gross proceeds of the sale, or sales of coal or coke to manufacturers, electric power companies and transportation companies for use or consumption in the production of by-products, of the generation of heat or power used in manufacturing tangible personal property for sale, for the generation of electric power or energy for use in manufacturing tangible personal property for sale or for re-sale, or for the generation of motive power for transportation.

(h) The gross proceeds from the sale or sales of fuel and supplies for use or consumption aboard ships plying the high seas either in inter-coastal trade between ports in the State of Alabama and ports in other states of the United States or its possessions or in foreign commerce between ports in the State of Alabama and ports in foreign countries. Provided, however, that nothing in this Act shall be construed to exempt or exclude from the measure of the tax herein levied the gross proceeds of sale or sales of material and supplies to any person for use in fulfilling a contract for the painting, repair, or reconditioning of vessels, barges, ships and other water craft.

(i) The gross proceeds of sales of tangible personal property to the State of Alabama, to the counties within the State, and to incorporated municipalities of the State of Alabama.

(j) The gross proceeds of the sale or sales of railroad cars, and vessels and barges of more than fifty tons burden, when sold by the manufacturers or builders thereof.

(k) The gross proceeds of the sale or sales of materials, equipment, and machinery which enter into and become a component part of ships, vessels or barges of more than fifty tons burden, constructed or built within the state.

(l) The gross proceeds of the sale or sales of fuel oil purchased as fuel for kiln use in manufacturing establishments.

(m) The gross proceeds of the sale or sales of tangible personal property to county and city school boards and independent school boards as defined by Senate Bill No. 20 of the 1959 Second Special Session of the Legislature of Alabama and all educational institutions and agencies of the State of Alabama, the counties within the State, or any incorporated municipality of the State of Alabama.

Section 34. The governor may, by executive order, authorize the department to provide by proper rules and regulations, for the allowance of a discount, not to exceed five percent of the first one hundred dollars of taxes levied and two percent of the taxes levied over one hundred dollars by this Act and due and payable to the state by any person licensed under the provisions hereof. Provided, however, that no discount shall be authorized or allowed upon any taxes which are not paid before delinquency, as in this Act provided.

Section 35. This Act supersedes Article 10 of Chapter 20, Title 51, Code of Alabama 1940, and all acts amendatory thereof or supplemental thereto, and such statutes are hereby repealed. Provided, that nothing herein shall be construed to relieve any person from any tax liability, penalty, or forfeiture incurred under such laws and statutes before the effective date of this Act; and any provisions of said Article 10 of Chapter 20, Title 51, providing for the collection and enforcement of any tax, liability, penalty or forfeiture thereunder shall as to such tax, liability, penalty, or forfeiture remain in full force and effect.

Section 36. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 37. This Act shall take effect October 1, 1959.

Approved August 18, 1959.
Time: 3:15 P.M.

APPENDIX E

Excerpts from the Alabama Sales Tax Statute

Title 51, Article 10, Code of Alabama 1940 (Recompiled 1958) as amended:

§ 786(2). *"Definitions.*—The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

* * *

"(e) The term "sale" or "sales" includes installment and credit sales and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale.

"(f) The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property. . . .

"(g) The word "taxpayer" means any person liable for taxes hereunder.

"(h) The term "gross receipts" means the value proceeding or accruing from the sale of tangible personal property. . . .

"(i) The term "wholesale sale" or "sale at wholesale" means a sale of tangible personal property . . . for resale and does not include a sale by wholesalers to users or consumers, not for resale. . . .

"(j) The term "sale at retail" or "retail sale" shall mean all sales of tangible personal property except those above defined

as wholesale sales. The quantities of goods sold or prices at which sold, are immaterial in determining whether or not a sale is at retail. Sales of building materials to contractors, builders, or landowners for resale or use in the form of real estate are retail sales in whatever quantity sold. . . .

"(k) The word "business" as used in this article, shall include all activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit or advantage, either direct or indirect, and not excepting subactivities producing marketable commodities used or consumed in the main business activity, each of which subactivities shall be considered business engaged in, taxable in the class in which it falls.

* * *

"(m) The use within this state of tangible personal property by the manufacturer thereof, as building materials, in the performance of a construction contract, shall, for the purposes of this article be considered as a retail sale thereof by such manufacturer, who shall also be construed as the ultimate consumer of such materials or property, and who shall be required to report such transaction and pay the sales tax thereon, based upon the reasonable and fair market price thereof at the time and place where same are used or consumed by him or it. The provisions of this subsection shall not apply to any tangible personal property which is specifically exempted from the tax levied in this article.

* * *

"§ *786(3). Tax levied on gross receipts.*—There is hereby levied, in addition to all other taxes of every kind now imposed by law, and shall be collected as herein provided, a privilege or license tax against the person on account of the business activities and in the amount to be determined by the

application of rates against gross sales, or gross receipts, as the case may be, as follows:

"(a) Upon every person, firm, or corporation . . . engaged, or continuing within this state, in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character, . . . an amount equal to four percent [three precent until July 1, 1963] of the gross proceeds of sales of the business except where a different amount is expressly provided herein. Provided, however, that any person engaging or continuing in business as a retailer and wholesaler or jobber shall pay the tax required on the gross proceeds of retail sales of such business at the rates specified, when his books are kept so as to show separately the gross proceeds of sales of each business, and when his books are not so kept he shall pay the tax as a retailer, on the gross sales of the business. . . .

* * *

"§ *786(4).Exemption of sales and businesses which state cannot constitutionally tax.*—There are exempted from the provisions of this article and from the computation of the amount of the tax levied, assessed or payable under this article the gross proceeds of sales of tangible personal property or the gross receipts of any business which the state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this state. (1959, 2nd Ex. Sess., p. 303, §3, effective Oct. 1, 1959.)

* * *

"§ *786(25). Tax to be added to purchase price: refund unlawful: penalty: tax a direct tax on retail consumer.*—Every person, firm, corporation, association, or co-partnership

engaged in or continuing within this state in the business for which a license or privilege tax is required by this article shall add to the sales price and collect from the purchaser on all sales upon the gross receipts or gross proceeds of which there is levied by this article a sales tax at the rate of four percent, four cents tax for each whole dollar of sales price. . . . Upon all sales the gross receipts or gross proceeds of which are taxed by this article at a rate less than four percent, there shall be added to the sales price and collected from the purchaser by such person, firm, corporation, association, or co-partnership described in this section an amount equal to the prescribed percentage of such sales price. It shall be unlawful for any person, firm, corporation, association, or co-partnership described in this section to fail or refuse to add to the sales price and collect from the purchaser the amount required by this section to be so added to the sales price and collected from the purchaser; and it shall likewise be unlawful to refund or offer to refund all or any part of the amount collected, or to absorb or advertise directly or indirectly the absorption or refund of the amount required to be added to the sales price and collected from the purchaser, or any portion of such amount. Any person, firm, corporation, association, or co-partnership violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than fifty dollars nor more than one hundred dollars, or may be imprisoned in the county jail for not more than six months or by both such fine and imprisonment, and each act in violation of the provisions of this article shall constitute a separate offense. The provisions of this section that there shall be added to the sales price and collected from the purchaser the amounts provided herein shall in no way relieve the person, firm, corporation, association or co-partnership described in this section of the tax

levied by this article; nor shall the inability, impracticability, refusal, or failure to add to the sales price and collect from the purchaser the amounts provided herein relieve such person, firm, corporation, association, or co-partnership from the tax levied by this article. All taxes paid in pursuance to this article or any other statute enacted in this connection shall conclusively be presumed to a direct tax on the retail consumer, pre-collected for the purpose of convenience and facility only. (1959, 2nd Ex. Sess., p. 310, §24, effective Oct. 1, 1959; 1963, 2nd Ex. Sess., p. 288, §2, effective July 1, 1963.)"

APPENDIX E-1

ALABAMA TAX REFUND PROVISIONS

Applicable Alabama Tax Refund Provisions, Code of Alabama, 1940 (Recompiled, 1958), as amended, Title 51, Sections 890 and 891:

"§*890. Remedies of taxpayer.*—Whenever any taxpayer claims that any tax, except ad valorem taxes, levied under the provisions of this law as fixed by the officer authorized to collect same is excessive or is invalid, either in whole or in part, the taxpayer shall pay such tax under protest, and the officer receiving the same shall note on the receipt that such tax was paid under protest. The taxpayer shall commence suit against the officer for the recovery of such excessive or invalid tax, as

the case may be, within sixty days after the payment thereof under protest, and unless such suit is commenced within that period of time, for the recovery of the amount of taxes claimed to be excessive or invalid, the taxpayer shall be deemed to have waived the payment of such taxes under protest and to have thereby become a voluntary taxpayer. If suit is filed for the recovery of any taxes paid under protest, within the specified period of time, and it is determined upon a hearing of the case that any part of the taxes so paid is excessive or illegal, the same shall be refunded as provided in the succeeding section.

"§*891. Disposition of taxes paid under protest.*—Whenever any money is paid to any officer authorized to receive or collect same, as taxes paid under protest, such officer shall certify such sum of money to the state treasury, with notice to the treasurer that said sum of money was paid under protest by the identified taxpayer and it shall be the duty of the treasurer to hold such sum of money in an identified suspense account until it is judicially determined whether the taxes were legally levied and collected, or the taxpayer abandons the recovery of the money by failure to bring suit within the period of sixty days after the payment thereof. The treasurer shall give notice to the comptroller that such funds are set up in a suspense account and are therefore not available for allotment, allocation, or disbursement until the validity of the assessment and collection is determined by the court. If it is determined by the court, on suit brought by the taxpayer, that any portion of the taxes paid under protest was excessive or illegally assessed and collected, the comptroller shall issue his warrant upon the treasurer for a refund of such sum as may have been determined by the court to be excessive or invalid, and the remainder of such fund, if any, shall be allocated and disbursed as authorized by law.

APPENDIX F
THE CONTRACT TERMS RELATING TO TITLE TO PROPERTY

CONTRACT NO. 5608—The significant provisions of Contract No. 5608 relating to title to property are as follows:

"ARTICLE XXIV—TITLE TO PROPERTY, MATERIALS AND SUPPLIES

"Title acquired by the Government pursuant to the Clause of the General Provisions of this Contract entitled 'Government Property' shall vest directly in the Government. The Contractor shall include in each subcontract or purchase order, appropriate language reflecting this intent." (R 465)

See also "Schedule Article XXV—liability for government property," limiting the liability of the contractor for loss of Government property. (R 465)

"General Provisions Clause 21:

"21. GOVERNMENT PROPERTY

* * *

"(b) Title to all property furnished by the Government shall remain in the Government. Title to all property purchased by the Contractor for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to

and vest in the Government upon delivery of such property by the vendor. Title to other property, the cost of which is reimbursable to the Contractor under the contract, shall pass to and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract, or (iii) reimbursement of the cost thereof by the Government, in whole or in the percentage prevailing by reason of the clause of the contract entitled 'Allowable Cost, Fixed Fee and Payment,' whichever first occurs. All Government-furnished Property, together with all property acquired by the Contractor title to which vests in the Government under this paragraph, are subject to the provisions of this clause and are hereinafter collectively referred to as 'Government Property.'

"(c) Title to the Government Property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government Property, or any part thereof, be or become a fixture or lose its identify as personalty by reason of affixation to any realty. The Contractor shall comply with the provisions of the 'Manual for Control of Government Property in Possession of Contractors' (Appendix B, Armed Services Procurement Regulation), as in effect on the date of the contract, which Manual is hereby incorporated by reference and made a part of this contract." (R 533)

These provisions are repeated in various modifications to the contract.* None of the modifications changes the meaning or effect of such provisions.

CONTRACT NO. 5606(F) contains the following title clause:

"*15. TITLE*

"a. Title to all facilities and components furnished by the Government shall remain in the Government. Title to all other equipment, machinery and facilities, including installation materials and freight shall vest in the Government upon acquisition by the Contractor, or upon installation in the Government-furnished plants, whichever first occurs, or upon acquisition or installation for use in other plants when approved by the Contracting Officer, which first occurs. Title to other property, the cost of which is reimbursable to the Contractor under this contract, shall pass to and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract, or (iii) reimbursement of the cost thereof by the Government, whichever first occurs.

"b. Title to the Facilities shall not be affected by their incorporation in or attachment to any property

* (See, for instance, Schedule Article XXIII at R 659 and General Provisions Clause 30 at R 771.)

not owned by the Government, nor shall any item of the Facilities be or become a fixture of lose its identity as personalty by reason of affixation to any realty. Except as otherwise authorized by the Contracting Officer, the Contractor (i) shall keep the Facilities free and clear of all liens and encumbrances, and (ii) shall not remove or otherwise part with possession of, or permit the use by others of any of the Facilities." (R 821)

SUPREME COURT, U.S.
FILED
MAR 3 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1017

THE BOEING COMPANY,

Appellant,

V.

PHILLIP HAMM, AS COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA 3 DIV. 309-327, INCL.

MOTION TO DISMISS APPEAL AND TO AFFIRM AND BRIEF IN SUPPORT THEREOF.

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Counsel for the Appellee

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(Providing for a permit for purchases or users who buy regularly in large quantities, to pay tax directly to the State)

Issued under section 29 of Act 100, supra, Title 51, section 786(30), supra 16
See Jurisdictional statement, page 58a.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 1017

THE BOEING COMPANY,

Appellant,

V.

PHILLIP HAMM, AS COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF ALABAMA
3 DIV. 309-327, INCL.

MOTION TO DISMISS AND TO AFFIRM.

Appellee, pursuant to Rule 16 of the Revised Rules, moves that the appeal in this cause as filed by the Appellant be dismissed. Also that the opinion and judgment of the Supreme Court of Alabama, and also same as modified and extended on rehearing (Appendix-B to Appellant's Jurisdictional Statement, pp. 10a-32a, incl.) be affirmed. Moreover, that such be done on the grounds that the Alabama Supreme Court has in entering said judgment done nothing more than to strictly follow the decisions of this court in resolving the question involved as against the Appellant.

From aught that appears, this court has already decided the alleged question raised by the Appellant against the Appellant in other cases[1*] having very similar factual backgrounds. The question referred to is whether the cost-plus-a-fixed-fee contractor in purchasing the materials, etc., used by it to perform the government contracts involved, and to earn its fixed fees thereunder, was an agent of the United States in making such purchases, and as such clothed with the immunity of the Federal Government from paying state sales taxes on the sales made in this connection by the suppliers to such contractor.

The foregoing being considered, it appears that the Supreme Court of Alabama in deciding said question against the Appellant, and to the effect that the sales here involved to the Appellant from the suppliers were sales made to the Appellant "as an independent contractor and not as an agent of the government," has only followed the decisions of this court, and mainly **Alabama v. King & Boozer**, 378 U.S. 39, 845 S.Ct. 1518 (1941), **Curry v. United States**, 314 U.S. 14, 62 S.Ct. 48 (1941), and the principles thereof as recently restated and reaffirmed in **United States v. Boyd**, 378 U.S. 39, at 46, 49, and 50, 84 S.Ct. 1518, at 1522, 1524 and 1525 (1964). The Alleged question here then appears to have already been resolved and settled by this Honorable Court, and there seems to be no need to further review the subject matter.

> "* * * Constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly on the United States * * *"
>
> (Emphasis Supplied)

1* **United States v. Boyd**, 378 U.S. 39, 84 S.Ct. 1518 (1964); **Alabama v. King & Boozer**, 314 U.S. 1, 62 S.Ct. 43 (1941); **Curry v. United States**, 314 U.S. 14, 62 S.Ct. 48 (1941); **James v. Dravo Contracting Company**, 302 U.S. 134, 58 S.Ct. 208; etc.

United States v. Boyd, supra, 378 U.S. at 49 and 50, 84 S.Ct. at 1524 and 1525 (1964). See also **Alabama v. King & Boozer**, supra, 314 U.S. at 8 and 9, 62 S.Ct. at 45, and **Curry v. United States**, supra, 314 U.S. at 18, 62 S.Ct. at 49.

I

OPINION BELOW

The opinion below on appeal from the Montgomery County Circuit Court and also modified and extended on rehearing and wherein rehearing was denied, is now found in the Advance Sheet of the Southern Reporter dated January 16, 1969, and is unofficially reported as 216 So.(2d) 288, and as yet has not been officially reported. (Appendix-B to Appellant's Jurisdictional Statement, pp. 10a - 32a, incl.)

On rehearing the Alabama Supreme Court modified and extended the opinion and reversed the decision of the Montgomery County Circuit Court and in its stead rendered a decree in accordance with its own opinion. (216 So.(2d) at page 297, also Appendix-B at page 32a) The Alabama Supreme Court then nullified the decree and judgment of the Montgomery County Circuit Court (Appellant's Jurisdictional Statement, Appendix-A, p. 1a, et seq.) and held it to be erroneous in its entirety.

In addition to its opinion on appeal and opinion as modified and extended on rehearing (216 So.(2d) 288, et seq.), the Alabama Supreme Court completely annulled the final judgment and decree of the lower court, and in its stead wrote the final judgment and decree for the lower court.

> "IT IS CONSIDERED and ORDERED that the judgment of this court, dated October 3, 1968, should be modified by rendering in this court the judgments that the Circuit Court should have rendered.

"IT IS THEREFORE ORDERED AND ADJUDGED that the judgments of the Circuit Court in each of said causes be reversed and annulled; and this court, proceeding to render the judgments that the Circuit Court should have rendered, does hereby determine, order and adjudge that the sales tax collected from the plaintiff in each of these cases was legally and validly collected, and that no part thereof is due to be refunded to the plaintiff."

(Emphasis Supplied)

See Appendix-C to Appellant's Jurisdictional Statement, pp. 33a and 34a.

The first several paragraphs of the decree of the Montgomery County Circuit Court in these cases are highly prejudicial and are completely disassociated from the facts and the issues. (See pp. 1a and 2a of Appendix-A of Appellant's Jurisdictional Statement). The tenor of said opening paragraphs seems to permeate the entire decree. (Appendix-A, pages 1, et seq.).

In reversing the judgments of the Circuit Court and in holding the sales tax to have been legally and validly collected by the State of Alabama from the Appellant, the Alabama Supreme Court held that the decision of this court in **Alabama v. King & Boozer**, 314 U.S. 1, 62 S.Ct. 43, was controlling, in that nothing in the contracts in these cases (like in **King & Boozer**) gave the cost-plus contractor the right to obligate the government (NASA) or to pledge its credit in any fashion. It is also interesting to note that the decision in **King & Boozer**, as in this case, dealt with a contract which declared that title to all materials and supplies for which the contractors were entitled to be reimbursed should vest in the government.

"The circumstance that the title to the lumber passed to the government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract."

Alabama v. King & Boozer, supra, 314 U.S. at pages 13 and 14, 62 S.Ct. at page 47. See also **James v. Dravo Contracting Company**, 302 U.S. 134, at 160, 58 S.Ct. 208, at 221 (1937) and **United States v. Driscoll**, 96 U.S. 424, 24 L.Ed. 847 (1878).

On the basis of the fact that there was nothing in the contracts in these cases which gave the Appellant, as the cost-plus contractor, the right to obligate the government for the price of the materials, etc., or whereby the Appellant could pledge the government's credit when the sales were made by the suppliers to the Appellant, and the Appellant in this respect actually risked its own credit in purchasing the materials (whether the purchases were made under Contracts 5608 or 5606-F) the Alabama Supreme Court determined that the Appellant, "as an independent contractor and not an agent of the government" was the "purchaser" of the materials, and the person on whom the tax is said to fall under the Alabama Sales Tax Act.

On this basis, the Alabama Court observed that the situation differs substantially from that in the decision in **Kern-Limerick, Inc. v. Spurlock**, 347 U.S. 110, 74 S.Ct. 403 (1954), wherein the Arkansas Sales Tax was struck down. The contract there provided that, "The contractor shall act as the purchasing agent of the government in effecting such procurement * * *" It also provided that, "the government shall be directly liable to the vendors for the purchase price." 347 U.S. at 112, 74 S.Ct. at 405 (Margin 2). Under such circumstances the majority of this court held that the government (and not the contractor) was the "purchaser" on whom the tax was said to fall, but on whom the tax could not be validly levied or applied under the constitution.

In these cases, and to make the situation even a stronger one than that, in **Alabama v. King & Boozer**, supra, the court

pointed out that the prime contract (Contract No. 5608) in these cases under Article I A, "Statement of the Work, Services and Supplies to be Furnished," Plaintiff's (Appellant's) Exhibit 1(b), R. pp. 442, at 444, expressly provides that:

> "The contractor, as an independent contractor and not as an agent of the government, shall * * * furnish the necessary management, labor, facilities, materials, tools, and equipment (except as specified herein to be furnished by the government) * * *"
>
> (Emphasis Supplied)

The foregoing being considered, it appears that whether we proceed under the so-called "legal incidence" doctrine of **King & Boozer** and of **Boyd**, or the so-called "contract-agency" doctrine of **Kern-Limerick, Inc. v. Spurlock**, that the Appellant as an "independent contractor" under either doctrine is clearly liable for the tax.

II.

STATEMENT OF APPELLANT IN SUPPORT OF JURISDICTION

The Appellee does not deny that the alleged question on this appeal is a federal question, and one that this court has every right and authority to review if it chooses to do so. What the Appellee is saying in this respect is that it clearly appears that this court has, in **King & Boozer, Curry, Dravo Contracting Company**, and under the principles that it has enunciated in **Boyd**, and wherein it reaffirmed **King & Boozer** and **Curry**, already actually resolved the alleged question in this case, and there is really no necessity in spending its valuable time in reviewing same. As pointed out by the Alabama Supreme Court (Appendix-B, pp. 29a and 30a -- Jan. 16, 1969, Pocket Part to 216 So.(2d), at pages 295 and 296), even under the holding in **Kern-Limerick, Inc. v. Spurlock**, 347 U.S. 110, 74

S.Ct. 403, and the "contract-agency" doctrine, the Appellant under the facts and the contracts in this case did not have the necessary attributes of an agent of the government in making the purchases of the materials, etc., nor could it have clothed itself with the immunity of the sovereign from paying the state sales tax on the sales made to it by the vendors or suppliers. In fact, the prime contract (Contract 5608, Exhibit 1(b), R. p. 442, at p. 444) expressly provided that the Appellant was to furnish such materials, etc., and to otherwise perform the contract "as an independent contractor and not as an agent of the government." This is completely the antithesis of what was contained in the contracts in **Kern-Limerick, Inc. v. Spurlock, supra,** which expressly provided that the purchases were made by the government and that the government was obligated directly to the vendors for the purchase price.

The foregoing was very graphically illustrated in the opinion of the Alabama Supreme Court, as follows:

> "If the Supreme Court can be taken at its word that the form of contracts 'may determine the effect of state taxation on federal agencies' then we must conclude that these contracts fail to provide for immunity from state taxation for the independent contractor. Apparrently under **Kern-Limerick** there was nothing to prevent the federal government from so drawing the contracts. We think the case controlled by **Alabama v. King & Boozer**, supra. There, as here, the contract provided that title to all materials and supplies for which the contractors were 'entitled to be reimbursed' should vest in the government upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance by the government officer. There the Supreme Court held that
>
> > '* * * we think all the provisions which we have mentioned, read together, plainly contemplate that the contractors were to purchase in

> their own names and on their own credit all the materials required, unless the government should elect to furnish them; that the government was not to be bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site.
>
> * * *
>
> 'But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the government to enter into contracts or to pledge its credit.' (314 U.S. at 13 and 14, 62 S.Ct. at 47)

"So, here, the contracts expressly provide that Boeing is an independent contractor and not an agent of the government. Nothing in these contracts gives to Boeing the right to obligate the government or pledge its credit in any fashion. It differs substantially from the contract in **Kern-Limerick** which expressly provided for purchase orders with the following language:

> 'This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price; but the Contractor shall handle all payments hereunder on behalf of the Government. The Vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof.' (347 U.S. at 119 and 120, 74 S. Ct. at 409)
>
> * * *

"Paraphrasing the language of the Supreme Court of the United States in **U.S. v. Boyd**, 378 U.S. 39, at page 48, we cannot conclude that Boeing (Carbide and Fergerson in that case) a cost-plus-fixed-fee contractor for profit has been so incorporated into the government structure as to become an instrumentality of the United States and thus enjoy governmental immunity."

(Emphasis Supplied)

Jurisdictional Statement
Appendix, pp. 27a and 28a

The statements hereinabove made being considered, we do not dispute what the Appellant says in its "Grounds on Which Jurisdiction is Invoked." (Jurisdictional Statement, pp. 2 - 5, incl.)

We would like to add under paragraph number 5, page 5, of the Jurisdictional Statement, that the Alabama Sales Tax Act as rewritten and reenacted in 1959, as Act 100 of the 1959 Second Special Session of the Alabama Legislature (Acts of Alabama 1959, Vol. I, p. 298, et seq.), can now be found in the Pocket Part to Title 51 of the Alabama Code as Recompiled in 1958, as Sections 786(2) - (36), inclusive. Prior to the reenactment of the Act as Act 100 in 1959, supra, the Alabama sales tax was contained in Title 51, as Sections 752 - 781, inclusive, of the Alabama Code of 1940.

The levying Section of the Act, Title 51, Section 753 of the 1940 Code, which was mainly construed in **Alabama v. King & Boozer**, 314 U.S. 1, 62 S. Ct. 43, by the Alabama Court and also by this Court, has not in any material way been changed. Under Section 786(3) of Title 51, Pocket Part, 1958 Recompiled Alabama Code, and under subsection (a), the sales tax is still levied on the "retail sale" and the purchaser at said sale, the same as it was under Title 51, Section 753, supra, when that Section was considered and construed by this Court in **King &**

Boozer (314 U.S. at pages 9 and 10, under headnotes (2-4), 62 S. Ct. at pages 45 and 46).

> "The taxing statute as the Alabama courts have held, makes the 'purchaser' liable for the tax to the seller who is required 'to add to the sales price' the amount of the tax and collect it whether the sale is for cash or credit. Who in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. But it seems plain, as the government concedes, as we assume for present purchases, that under the provisions of the statute the purchaser of tangible goods who is subject to the tax measured by the sales price is the person who orders and pays for them when the sales is for cash or who is legally obligated to pay for them when the sale is on credit."
>
> (Emphasis Supplied)
>
> **Alabama v. King & Boozer**, 314 U.S. 1, at 9 and 10, 62 S. Ct. 43, at 46.

The undisputed facts in these cases show that the Appellant, as the cost-plus-a-fixed-fee contractor, ordered the materials and other tangible property, which it used in performing the contracts, from the suppliers. The suppliers billed the Appellant for the price of the materials, etc. (See Plaintiff's (Appellant's) Exhibits 1-G and 1-F, pp. 894-1029, incl., and 1032-1036, incl., respectively, the Purchase Orders and Billings; testimony of Mr. ImMasche, R. pp. 245, 246, and 247, and of Mr. McCutcheon, R. p. 265; Plaintiff's Exhibit 1-(a), Stipulation, R. p. 310). Moreover, the suppliers billed (Exhibit 1-F, R. pp. 1032-1036) the Appellant for the price of the materials in each instance, and the suppliers looked to the Appellant (and not the government) for payment, and the Appellant paid the suppliers in each instance with checks drawn on its own bank account and out of its own private funds. (R. pp. 244-247, incl., p. 265, and Stipulation, Exhibit 1-(a), R. p. 310).

The conclusive evidence then shows that the Appellant ordered the tangible personal property used by it in performing the contracts from the suppliers, that the suppliers billed the Appellant for the price of the tangible personal property, and looked to the Appellant (and not the government) for payment. And further that the Appellant in each instance paid the suppliers with its own checks and out of its own bank account and private funds. It is true that the government under the cost provisions of Contracts 2577 and 5608, reimbursed the Appellant for such expenditures each month, but it did so as it did as to any other item of cost under such contracts, i.e., for labor, rent, etc., and as a part of the cost.

Under the terms of the contracts and the facts, the Alabama Supreme Court in these cases held in effect that the Appellant as the cost-plus-a-fixed-fee contractor was the purchaser of the materials, etc., and the person on whom the tax fell. Moreover, that the materials were purchased by the Appellant, "as an independent contractor and not an agent of the government," and that these cases were "controlled by **King & Boozer**, supra," and not by **Kern-Limerick, Inc. v. Spurlock**, supra.

III.

STATEMENT OF THE CASE

In replying or supplementing what the Appellant has to say under each of the sub-topics under this general heading the Appellee will in each instance use the same heading as the Appellant has used.

Introduction

We agree that during most of the period covered by the audit and time involved in these cases, cost-plus-fixed-fee contract 5608 was the prime and main contract. However, Contract 5608

was actually an extension of Contract NA58-2577. (Exhibits 1(a) and 1(b), R. pp. 318, et seq., and 442, et seq., respectively). Both contracts were cost-plus-a-fixed-fee contracts. However, such facts are very conspicuous by their absence in the facts as are related by the Appellant. The Appellant fails to mention in its Jurisdictional Statement that these contracts were cost-plus-a-fixed-fee contracts.

Under Contract No. 2577 (Exhibit 1(a), R. p. 318) the estimated cost was $8,418,924.00, and the fixed fee was $492,038.00, and the total amount was $8,910,962.00.

Under Contract No. 5608 (Exhibit 1(b), R. p. 444) the estimated cost was $393,605,856.00, and the fixed fee $25,215,111.00, making a total of $418,820.967.00.

However, the above figures in both of the contracts were substantially increased from time to time by supplements to said contracts.

Contract No. 5606-F (Exhibit 1(c), R. p. 798 et seq.) is closely related to cost-plus-fixed-fee Contracts 2577 and 5608, and is said to be a cost contract only. However, it is closely related to Contracts 2577 and 5608, and constitutes actually a part thereof. It is a so-called "facilities" contract and deals with the purchases by the Appellant-contractor of certain types of "facilities" equipment, i.e., lathes, generators, drill presses, pumps, etc., which were used by the Appellant in performing Contracts Nos. 2577 and 5608. (Stipulation, Exhibit 1, pp. 311 and 312):

> "7. Plaintiff is engaged in research and development work at George C. Marshall Space Flight Center at Huntsville, Alabama. Its work is performed as a prime contractor with the United States Government under three interrelated contracts which are listed in paragraph 8 hereinbelow. The taxes here involved are

imposed by reason of acquisitions of tangible personal property by plaintiff from sellers or suppliers within the State of Alabama in connection with such contracts.

"The nature of plaintiff's work under the three interrelated contracts which appear as Plaintiff's Exhibit 1(a), (b) and (c) -- which contracts sometimes hereinafter will be referred to as "2577," "5606(F)" and "5608" -- is set out in each of the contracts * * *

"5608 carries the initial planning through manufacture and system tests of the S-1C. Under 5608, plaintiff has provided engineering design for the S-1C booster and for test equipment such as that used in the Dynamic Test Vehicle, which is a structure, the instrumentation for which was furnished by plaintiff, in which the entire Saturn V system (S-1C, S-II and S-IV B rockets) can be tested, in vertical position, for structural, aerodynamic and certain other characteristics.

"Contract 5608 is a cost-plus-fixed-fee contract (as was 2577). The "fixed fee" is based upon estimated costs which were agreed upon by plaintiff and NASA for fee determination purposes during negotiation of the contract. Contract No. 5606(f) is a cost contract only, and plaintiff receives no fee in connection therewith.

"Contract No. 5606(F) is a "facilities" contract rather than a "research and development" contract. It is merely an agreement which established the terms under which plaintiff was authorized and directed to acquire certain types of general-use facilities with which to carry out the work required under 2577 and 5608."

(Emphasis Supplied)

Stipulation, Exhibit 1, R. pp. 308-311, incl.

Contracts Nos. 2577 and 5608 under Article II, Services and Supplies to be Furnished, Statement of Work, Exhibits 1(a) and 1(b), R. pp. 320 and 444, respectively, expressly provide that the contractor is to furnish the labor, materials, etc., and to

otherwise perform these contracts, "as an independent contractor and not an agent of the government."

Appellant contends that these provisions of the contracts are mere labels, and are actually shadows without substance. However, it is hard to believe that such provisions were inserted in these contracts for no reason at all and just to fill up space. When, however, the Appellant comes to the Title Provisions of these contracts, this of course, is another story.

Actually, the Appellant was to assist in developing the Appollo-Saturn moonship or rocket, and primarily to develop the S-1C or initial thrust part. See Configurations on pages 1037 and 1038 of the Record. However, the Appellant did play a part in "still" testing from time to time several of the complete experimental rockets, as a part of the overall research and development program.

We agree that the controversy here arises from the imposition by the State of the tax as against the Appellant, as the Contractor, as to the purchases it has made of the materials, etc., from the suppliers, which materials the Appellant used in performing cost-plus-fixed-fee Contracts Nos. 2577 and 5608 and that the Appellant contends in this respect and mainly under the "Title" and the "Government Property," provisions of the contracts, that such acquisitions were made by it as an agent of the government (NASA), and that its purchases (and the retail sales in this respect) were immune from taxation under the doctrine of sovereign immunity.

On the other hand, it is the Appellee's contention that not only under the provisions of the Contract expressly designating the Appellant as "an independent contractor" in furnishing the materials and in otherwise performing said contracts, but also under the undisputed facts, that the Appellant ordered the materials in its own name, obligated its own credit and paid

for the materials with its own funds, and that the suppliers looked to the Appellant (and not the government) for payment,[*2] that these cases fall directly within the doctrines and purview of **King and Boozer** (314 U.S. 1, 62 S.Ct. 42) and **Curry** (314 U.S. 14, 62 S.Ct. 48), which were reiterated and reaffirmed in **Boyd** (378 U.S. 39, 84 S.Ct. 1518). This was also the view of the Alabama Supreme Court in reversing and in rewriting the judgments and decrees of the Montgomery County Circuit Court.

The Nature of the Alabama Sales Tax

What the Appellant has to say under its first four paragraphs of this sub-topic is substantially correct. However, we disagree somewhat with what the Appellant states under its fourth and last paragraph under this sub-topic.

We agree that the Alabama Sales Tax is a "vendee tax." However, the incidence of the tax has been said to be on the "purchaser" at the retail sale, and the "purchaser" at the retail sale is "the last person to whom property passes in the course of ownership," as contemplated by the old law (Title 51, Section 753(a), Alabama Code 1940) and under the new law (Act 100, Section 2(a), supra, Title 51, Section 786(3)(a), Pocket Part, Alabama Code, Recompiled 1958). This is clearly a matter of fact as well as law. The tax is collected when the retail sale is made and the tax is paid by the purchaser at the cash register. Failure of the vendor to collect the tax from the "purchaser" when the sale is made (where the sale is for cash) violates the penal provisions of the law. The tax, therefore, becomes due when the retail sale is made, and the vendor

[*2] See in this respect testimony of ImMasche, R. pp. 245, 246 and 247; of McCutcheon, R. pp. 265; stipulation, Exhibit 1, p. 310; Purchase Orders, R. pp. 904-1029, incl.; and Invoices and Billings, R. pp. 1030-1039, incl.

is required by law (subject to penalties) to collect the tax from the "purchaser," at the time of the retail sale.

As mentioned by the Appellant, the reason that the vendors or suppliers did not collect the tax from the Appellant at the time the sales were made by them to the Appellant was because the Appellant had procured a so-called Regulation "A" permit (Act 100, Section 29; Title 51, Section 786(30), Pocket Part, Alabama Code, Recompiled 1958) which permitted the Appellant as a large purchaser and user, and as a matter of convenience, to report and pay the tax directly to the State Department of Revenue (instead of the vendor or suppliers at the time of the retail sale) on a monthly basis.

The sales tax then is to be collected from the "purchaser" at the retail sale, and the tax falls on the purchaser. **Alabama v. King and Boozer**, supra; 314 U.S. at 9, 10, and 12, 62 S.Ct. at 45, 46, and 47. **National Linen Service Corp. v. State Tax Comm.**, 237 Ala. 360, 186 So. 478 (appendix 1-B, p. 16a); **Associated Contractors v. Hamm** (1964), 277 Ala. 500, 172 So.2d 385, at 388.

> ". . . The taxing statute, as the Alabama courts have held, makes the 'purchaser' liable for the tax to the seller who is required 'to add to the sales price' the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or on credit. Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. But it seems plain, as the Government concedes and as we assume for present purposes, that under the provisions of the statute the purchaser of tangible goods who is subject to the tax measured by the sales price is the person who orders and pays for them when the sale is for cash or who is legally obligated to pay for them if the sale is on credit. . . ."
>
> (Emphasis Supplied)

Alabama v. King and Boozer, supra, 314 U.S. at pages 9 and 10, 62 S.Ct. at pages 45 and 46.

The Appellant is clearly the "purchaser" in these cases, upon whom the tax falls. The undisputed evidence is that the Appellant orders the materials, pays for them with its own checks, and out of its own private funds, and that the suppliers look to the Appellant (and not the government) for payment. (R. pp. 245, 246, 247, 265, Stipulation, Exhibit 1, page 310, Purchase Orders, R. pp. 904-1029, and Billings, R. pp. 1030-1039.)

How the Federal Question was Raised in the Proceeding Below

We do not dispute what the Appellant has said under this topic. We certainly do not agree with the Appellant's contentions raised in its bill of complaint or raised otherwise in these proceedings, but we certainly do not deny that the Appellant has made them, or that the other proceedings described by the Appellant under this topic are not in keeping with the facts.

Again, we reiterate that the question involved here is in our humble opinion clearly a federal one, and that this court is clearly authorized and empowered to review the cases, if it chooses to do so. It clearly appears, however, that the question has already been resolved by this Court in **King and Boozer** and in **Curry**, and that the doctrines of those cases have recently been both restated and reaffirmed in **United States v. Boyd.**

V.

STATEMENT OF THE FACTS

We do not intend to attempt to re-try these cases on the merits or propose to engage in a running gun battle with the Appellant concerning what it says are the facts. Much of what

the Appellant says are facts under this heading are actually conclusions or attempted interpretations of some of the documents involved, rather than facts.

a. The Contracts In General

Time, space and the rules of the court will not permit the Appellee to detail the facts involved, which are contained in three voluminous volumes of the record. However, it is well to state that the Appellant, Boeing, a private corporation, during the time involved, was engaged in performing three "inter-related" contracts, namely, 2577, 5608 and 5606-F. (See Stipulation, Par. 8, R. pp. 228, et seq.). Contracts Nos. 2577 and 5608 were cost-plus-a-fixed-fee contracts. (Appellant's Exhibits 1(a), R. pp. 318 et seq., and 1(b), R. pp. 442 et seq., respectively).

Under Contract 2577 the estimated cost was, to wit, $8,418,924.00, and the fixed fee was $492,038.00, although by supplements thereto these figures were from time to time substantially increased. (R. p. 318). Under Contract 5608 the estimated cost was $393,605,856.00, and the fixed fee was $25,215,111.00, but by supplements to the contract these figures were also from time to time substantially increased. (R. p. 442).

Contract No. 5606-F, which was inter-related to contracts 2577 and 5608, and actually a part (Stipulation, Par. 7, R. p. 228) or supplement thereof, was a cost contract only and dealt with the procurement of certain facilities and equipment to be used by the contractor under Contracts Nos. 2577 and 5608. (Appellant's Exhibit 1(c), R. pp. 798, et seq.).

Under said cost-plus Contracts 2577 and 5608 the Appellant was engaged in an overall program with NASA and other government cost-plus-a-fixed-fee contractors in an effort to

develop the Appollo-Saturn Rocket or so-called Moonship. The Appellant was mainly engaged in this respect in developing the initial thrust part of the rocket or the so-called S-1C. (See diagrams, R. pp. 1038 and 1037; also R. p. 249, etc.). However, at the Dynamic Test Stand located on the Huntsville Arsenal the Appellant not only "shake" tested the S-1C, but it also participated in "shake" testing several completely assembled experimental rockets. (R. pp. 251, 285, 286, etc.). In Alabama the Appellant's work under Contracts 2577 and 5608 was exclusively research and development. (R. pp. 228, etc.). It used all the materials, equipment and supplies which it purchased from the vendors in Alabama in performing said work and said Contracts 2577 and 5608. (R. p. 251, etc.).

b. The Materials Were Ordered And Paid For By The Contractor.

The undisputed evidence and testimony of the Appellant's own witness, Mr. ImMasche, the Appellant's Finance Officer at New Orleans, and Mr. McCutcheon, one of the Government Property Administrators at Huntsville Arsenal, was to the effect that the Appellant ordered the materials, etc., from the suppliers, was billed for the purchase price by the suppliers, and that the Appellant paid the suppliers for the materials with its own funds, and with checks drawn on its own private bank account. (R. pp. 245, 246 and 247; also R. p. 265; Stipulation, Exhibit 1, R. p. 310).

The suppliers looked to the Appellant (not the government) for payment of the purchase price. (R. 245 and 246; R. p. 265). This is also very obvious from an examination of the representative copies of the purchase orders, which were introduced in evidence. They all show the Appellant to be the "buyer" or purchaser, and the suppliers to be the sellers. (Exhibit 1-F, R. pp. 894-1029, incl.) and it is also very clear from the purchase invoices or billings from the suppliers. These billings

are all to the Appellant as the "buyer" or purchaser, and they are just regular billing forms used as to any other private sale.

They are exclusively between the supplier and the Appellant as the "buyer." They say nothing whatsoever about the government, nor is the government mentioned thereon. (Exhibit 1-G, R. pp. 1030-1036, incl.).

The purchase orders and the billings (R. pp. 894-1029, pp. 1030-1036) do not at any place provide that the purchases are to be made with funds belonging to the government, or that the government is to be bound for the payment of the purchase price. Moreover, there are clearly no provisions in the contracts (2577, 5608, and 5606-F) to this effect.

There is then not one document which is applicable to these cases, which expressly provides that the purchases were to be made with government funds or that the government was to be bound to the vendors for the payment of the purchase price of the materials, or that the contractor was authorized to pledge the government's credit. On the other hand, Contracts 2577 and 5608, expressly provide to the contrary, that the Appellant was to perform the contracts and furnish the necessary labor, materials, etc., "as an independent contractor and not as an agent of the government." (R. pp. 320 and 444).

In addition to the foregoing, the vendors or suppliers delivered the materials to the Appellant either at its Complex and place of business located in downtown Huntsville, Alabama, or at its Dynamic Test Stand located on the Redstone or Huntsville Arsenal. (R. pp. 265, 266). Moreover, the materials, etc., were all stored by Boeing or were otherwise under Boeing's custody and control until Boeing used the materials, equipment and supplies in performing Contracts Nos. 2577 and 5608. (R. pp. 247, 248, 250, etc.).

It is also well to state that the audit made by the State's Agent and Accountant, Mr. Alspaugh (R. pp. 1039-1104, incl.), and which is the basis for all of the tax claimed to be due by the state,, includes (after all deletions have been made) only the sales of materials, equipment and supplies which were purchased by the Appellant from private suppliers or vendors. The State's Auditor, Mr. Alspaugh, so testified. (R. pp. 297-300, incl.).

c. Facts Are Comprehensively Stated In The Stipulation And In The Opinion Of The Alabama Supreme Court.

The facts of these cases are very comprehensively stated in the Stipulation (Exhibit 1, R. pp. 227-236, incl., and 307-317, incl.) and in the Opinion of the Supreme Court of Alabama. (Appendix B to Jurisdictional Statement, pp. 10a-14a, incl.; 216 So.(2d) at pages 289, 290 and 291). Therefore, to save time and space the Appellee will by way of reference adopt the facts as are stated in the Stipulation (R. p. 227-236) and in said Opinion (Jurisdictional Statement, Appendix, pp. 10a-14a, incl.) and will make them a part hereof as if they were copied herein, in addition to the facts as have been hereinabove stated.

d. Neither The Contracts Or The Conditions Said To Relate To The Purchase Orders Made The Appellant The Agent Of The Government Or Authorized The Appellant To Bind Or To Pledge It's Credit.

The Appellant really grabs at straws and appears to attempt to twist certain remote and fine print provisions of the contracts, or the instructions or conditions which were said to relate to the purchase orders, in arguing that such provisions or conditions actually "indicate" that the Appellant purchased the materials, etc., which it used in performing the contracts and in earning its fixed fees thereunder, for the account of the

government, and as the agent of the government. In this respect the Appellant refers to paragraphs 18 and 19 of the Conditions (R. p. 887) and also other provisions as are contained on pages 886 and 889 of the Record. The conditions referred to by the Appellant are so vague, uncertain and ambiguous in their terms and even in their implications, that not even an expert or an able lawyer can interpret their real meaning, much less laymen like the vendors or suppliers.

It is, however, very noticeable in this respect that throughout the Conditions the contractor (and not the government) is referred to as the "Buyer" or purchaser, and the vendor as the "Seller."

Specific reference is made in this respect to what the Appellant has to say on pages 12, 13, 14 and 15 of its Jurisdictional Statement, and under subtopic "d," entitled "The Purchase Order Terms and Conditions Indicate that Procurements were for the Account of NASA."

We would think in this regard that it would take much more than an "indication" for a contractor or anyone else for that matter to bind the government's funds or to pledge its credit.

Neither the contracts, or the instructions or conditions said to relate to the purchase orders, provide in any place or at any point that the cost-plus contractor was to be the agent of the government (NASA) in purchasing the materials or that the cost-plus contractor was authorized to bind the funds of the government as to the payment of the purchase price or to in any respect pledge the government's credit in this respect. Such expressions in both the contracts, and in the instructions or conditions said to relate to the purchase orders, are very conspicuous by their being completely absent therefrom.

For the protection of the public, and as a matter of public policy, it appears that if the cost-plus contractor had the

authority to act as the government's agent and to bind its funds and to pledge its credit, that this should be expressed in the contracts and in the conditions in clear and unmistakable language; not just be intimated or "indicated" in some hidden ball play or some remote and indefinite part of the conditions or instructions.

On the other hand, it does appear significant in this respect that cost-plus-a-fixed-fee Contracts 2577 and 5608, both under "Services and Supplies to be Furnished, Statement of the Work," very clearly and expressly provide that the contractor shall perform the work under the contracts and furnish the labor, materials, etc., "as an independent contractor and not as an agent of the government." See Appellant's Exhibits 1(a) and 1(b), R. pp. 320 and 444.

Appellant says that these very clear and expressed provisions of the contracts are mere scraps of paper and are actually nothing more than labels. However, it appears that they were inserted in these contracts for some purpose, and not to just fill up space.

e. The Title Provisions Of The Purchase Orders And The Contracts Do Not Determine Who Is The Purchaser; Nor Do They Authorize The Contractor To Bind The Government For The Purchase Price, Or To Pledge Its Credit.

After considering practically the same title and government property provisions contained in the contract and in the conditions relating to the purchase orders in that case, and under facts very similar to the facts in these cases, the Alabama Supreme Court in **Associated Contractors v. Hamm**, 277 Ala. 500, 172 So.(2d) 385, at 386-388, incl. (1965), concluded, as follows:

> "These various provisions do not make it crystal clear as to the exact intention of the parties with respect to.

technical legal title. However, we are in complete agreement with the trial court in its conclusion that at least insofar as the Alabama Use Tax statute is concerned, the Associated Contractors had sufficient title, control and possession of these various materials when they came to rest in this state to invoke the statute. The language of the statute does not seem to indicate that the legislature intended to predicate the tax upon one who held technical legal title and no other."

(Emphasis Supplied)

172 So.(2d) at page 387.

It also seems significant in this respect that this court in **Alabama v. King & Boozer**, 314 U.S. 1, at 13 and 14, 62 S.Ct. 43, at 47, in considering similar title and government property provisions, said:

"The circumstance that the title to the lumber passed to the government upon delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract."

314 U.S. at pages 13 and 14.

Speaking also in **Alabama v. King & Boozer**, supra, about the supervision and control and reservations or conditions in the contracts, etc., this court to practically the same effect asserted:

"But, however extensively the government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the government to enter into contracts or to pledge its credit."

(Emphasis Supplied)

314 U.S. at page 13.

f. The Contractor Paid The Vendors With Its Own Private Funds, And Pledged Its Own Credit -- Not That Of The Government (NASA).

While we hesitate to wear the term out, we know of no better way to express it than to say that under the undisputed evidence that the Appellant ordered the materials, was billed for them by the suppliers, paid the suppliers with its own checks and out of its private bank account and with its own funds. Moreover, that the suppliers looked to the Appellant (not to the government) for payment. (R. pp. 245, 246, 247, and 265; Stipulation, R. p. 310; and Purchase Orders, R. pp. 394-1029, incl., and Billings, R. pp. 1030-1036, incl.

Moreover, neither the contracts nor the conditions relating to the purchase orders gave the Appellant any authority, expressed or otherwise, to obligate the funds of the government or to bind the government as to the payment of the purchase price or to obligate its credit. To the contrary, Contracts 2577 and 5608 expressly provided that the Appellant, as the cost-plus contractor, was to perform the work and to furnish the management, labor, materials, equipment and supplies "as an independent contractor and not as an agent of the government." (R. pp. 320 and 444).

We cannot see where the time that the government reimbursed the "independent contractor" for the cost of the management, labor, materials, etc. is important. The Appellant in the first place furnished all of these items "as an independent contractor."

g. The Alabama Court Based Its Opinion On King & Boozer And United States v. Boyd.

The Alabama Supreme Court reversed and rendered the judgments of the Circuit Court of Montgomery County in these cases, and in doing so rewrote the judgments in accordance with its opinion of October 3, 1968 (Jurisdictional Statement, Appendix B, pages 10a-29a), and as modified and extended on

rehearing on November 7, 1968 (Jurisdictional Statement, pages 29a-32a; also see Appendix D, page 33a).

The reversing of the judgments of the Circuit Court was not based solely on the fact that Contracts 2577 and 5608 contained the provision that the contractor was to perform the contract and furnish the materials, etc., "as an independent contractor and not as an agent of the government." This was indeed a material factor, but certainly not the only one. The court, after reviewing the facts, and also the findings and conclusions of the Circuit Court; reversed the judgments of the lower court in their entirety.

In doing this the Alabama court based its decision on **Alabama v. King & Boozer**, supra (Appendix B, p. 27a), and also on **United States v. Boyd**, 378 U.S. 39, at pp. 48 and 50 (Appendix-B, pp. 28a and 29a).

> "We think the case controlled by **Alabama v. King & Boozer**, supra. There, as here, the contract provided that title to all materials and supplies for which the contractors were "entitled to be reimbursed" should vest in the government upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance by the government officer. There the Supreme Court held that
>
> > '* * *we think all the provisions which we have mentioned, read together, plainly contemplate that the contractors were to purchase in their own names and on their own credit all the materials required, unless the government should elect to furnish them; that the government was not to be bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site.
>
> * * *

> But, however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the government to enter into contracts or to pledge its credit.' "
>
> (Emphasis Supplied)
>
> Jurisdictional Statement, Appendix B, page 27a.

The other factors on which the Alabama court proceeded were based on the facts, and mainly the fact that the Appellant (*not* the government) was the actual "purchaser" of the material, etc., and the one on whom the tax is said to fall.

The alleged question of sales for resale was fully treated with by the Alabama court on rehearing (Jurisdictional Statement, Appendix B, pages 30a and 31a). The question of whether the sales were sales for resale or wholesale sales, is solely a question to be resolved under the State Sales Tax statute defining what under the sales tax constitutes "wholesale sales" and "retail sales." (Appendix D, Section 1(i) and 1(j), pp. 37a and 38a).

V.

THE FEDERAL QUESTION IS NOT SUBSTANTIAL, AS IT HAS ALREADY BEEN RESOLVED BY THIS COURT.

The alleged question presented is whether the Alabama Sales Tax as levied under Section 2(a) of Act 100, supra (Appendix D to Jurisdictional Statement, page 40a), Title 51, Section 783(3) (a) Pocket Part, Alabama Code, Recompiled 1958, on the retail sale, and on the "purchaser," was constitutional as applied to the Appellant as a cost-plus-a-fixed-fee contractor for profit, and under the facts of these cases?

Stated in another way and in short, was the United States (NASA) the "purchaser" of the materials purchased from the vendors and used by the Appellant, as the cost-plus contractor, to perform the contracts, or was the Appellant as an "independent contractor" the "purchaser," on whom the sales tax is said to fall?

If the government purchased the materials from the vendors, or the Appellant purchased them as the actual and duly constituted agent of the government, with full authority to bind the government to pay for the materials or to pledge the government's credit to the vendors, then the sales would be exempt from the tax. However, in these cases both the facts and the contracts clearly show to the contrary that the Appellant, as the contractor, purchased the materials from the vendors with its own private funds, and that the Appellant in making such purchases had no authority whatsoever to bind the government for the payment of the purchase price or to pledge the government's credit in this respect.

In Reply to Appellant's Reason 1.

This court in **United States v. Boyd** (1964), 378 U.S. 39, at 49 and 50, 84 S.Ct. 1518, at 1524 and 1525, accepted the principles of **King & Boozer, Curry, Esso** and **Muskegon** as providing the proper balance between the interest of the state to tax and the interest of the government to be free from taxation. Alteration of the principles of **Boozer, Curry, Esso** and **Muskegon**, this court in the **Boyd** case (378 U.S. at pages 49 and 50, 84 S.Ct. at pages 1524 and 1525) found not to be its responsibility, but that of the Congress.

Tennessee, in the **Boyd** case, collected from **Union Carbide** and **H. K. Ferguson Company**, the government cost-plus contractors involved, sales and use tax upon purchases made

by them pursuant to their contract with the Atomic Energy Commission (hereinafter referred to as the AEC). The companies and the AEC, seeking to recover these taxes under the concept of governmental immunity, asserted that the United States was the actual purchaser, and that the use of the property purchased was not for the companies' commercial benefit, but was a use exclusively for the benefit of the United States.*4

Operating under a cost-plus-a-fixed-fee management contract, Carbide was obligated to manage the AEC installation at Oak Ridge, with the AEC retaining the right to supervise and issue major policy directives. A specific function of Carbide was the procurement of supplies and equipment, which it was free to do without AEC approval in amounts not exceeding 100,000 dollars. Ferguson's cost-plus-a-fixed-fee contract required construction services at the plant. Purchase of essential equipment was handled similar to the system used by Carbide, except Ferguson was restricted to 10,000 dollars without approval. In the trial court the chancellor entered a decree

*4 Carbide was a litigant in an earlier case with the Tennessee Department of Revenue, wherein it contended that it was not subject to Tennessee sales and use taxes. Its claim was based on two premises: (1) that it was an agent of the United States, and (2) that Section 9(b) of the Atomic Energy Act, 60 Stat. 765 (1946) afforded statutory exemption. The Supreme Court of Tennessee held in **Carbide and Carbon Chemical Corp. v. Carson**, 192 Tenn. 150, 239 S.W.(2d) 27 (1951), that Carbide was not an agent but an independent contractor, but that it was exempt under Section 9(b). The Supreme Court of the United States affirmed. **Carson v. Roane-Anderson Co.**, 342 U.S. 232 (1952). In 1953 Congress repealed the language of Section 9(b), 67 Stat. 575 (1953), expressly to remove the immunity previously created by statute as aforesaid, and for the purpose of making such contractors subject to State Sales and Use Tax, the same as other government cost-plus contractors, where the incidences of such taxes fall on such independent contractors, and not directly on the government.

holding the companies liable for the sales and use taxes. On appeal, the Tennessee Supreme Court reversed as to the sales tax, but sustained the collection of the contractors' use tax on the theory that the companies were independent contractors. Considering only the validity of the use tax, this court, affirming the Tennessee Court, held the tax was not levied directly upon the government, but levied upon the companies' private use, and was therefore not violative of the constitutional immunity of the United States. **United States v. Boyd** (1964), supra.

The courts all agreed that **Carbide** and **Ferguson**, like **Carbide**, in a former case, and also **Roane-Anderson (Carbide and Carbon Chemical Corp. v. Carson**, 192 *Tenn.* 150, 239 S.W.(2d) 27 (1951); **Carson v. Roane-Anderson Co.**, 342 S.Ct. 232, 72 S.Ct. 257 (1952), were not agents of the United States in purchasing the necessary materials, etc., to perform the government cost-plus contracts in those cases, and were exempt from state sales tax and state use tax only because of being expressly given a special exemption as AEC Contractors under Section 9(b) of the Atomic Energy Act, which the Congress repealed in 1953 in order to put AEC Contractors on the same basis as all other government cost-plus contractors.

As pointed out by this court in **Boyd**, this served to completely nullify both the decisions of the Supreme Court of Tennessee and this court in **Roane-Anderson v. Carson**, supra, concerning any exemption at all to AEC Contractors, as such contractors were held in those cases to be independent contractors and not agents of the United States in making the purchases of the materials, and subject to Tennessee's sales and use taxes, but for the special exemption of AEC Contractors under Section 9(b) of the AEC Act, now repealed.

In discussing this and the effects thereof this court in **United States v. Boyd**, supra, stated:

> "It is undoubtedly true, as the Government points out, that subjection of government property used by AEC Contractors to state use taxes will result in a substantial future tax liability. But this result was brought to the attention of Congress in the debates on the repeal of § 9(b), which exempted the activities of AEC Contractors from state taxation; indeed the AEC argued that the repeal would substantially increase the cost of the atomic energy program by subjecting AEC Contractors to state "sales and use taxes" and "business and occupation" taxes. Nontheless, Congress, well aware of the principle that "constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly upon the United States." S.Rep. No. 694, 83d Cong. 1st Sess. 2, U.S. Code Congressional and Administrative News 1953, pp. 2379, 2380, repealed the statutory exemption for the declared purpose of placing AEC Contractors in the same position as all other government contractors. Act of August 13, 1953, c. 432, 67 Stat. 575."
>
> (Emphasis Supplied)
>
> **Boyd**, supra (1964), 378 U.S. at pages 47, 48, and 49, 84 S.Ct. at page 1524.

It is a pity that the Circuit Court could not have read the foregoing before going into its some two and one-half page discourse at the beginning of the judgments which it entered in these cases (Appendix A of the Jurisdictional Statement, pp. 1a, 2a, etc.) and wherein it gave the State of Alabama a rather severe reprimand for even attempting to levy sales taxes against the cost-plus-a-fixed-fee contractor involved in these cases.

> "The constitution immunizes the United States and its property from taxation by the States, **M'Culloch v. Maryland**, 4 Wheat. 316, 4 L.Ed. 579, but it does not

forbid a tax whose legal incidence is upon the contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States." (Citing **Alabama v. King & Boozer**, supra, **James v. Dravo Contracting Co.**, supra, among other cases).

(Emphasis Supplied)

Boyd, supra, 84 S.Ct. at page 1521.

"The use by the contractor for his own private ends -- in connection with commercial activities carried on for profit -- is a separate and distinct taxable activity."

Boyd, supra, 378 U.S. at page 45, 84 S.Ct. at 1522.

"The principles laid down in **Boozer, Curry, Esso**, and **Muskegon**, we think strike a proper judicial accommodation between the interest of the State's power to tax and the concerns of the Nation, they are workable and we adhere to them. *If they unduly intrude upon the* business of the Nation, it is for Congress, in the valid exercise of its proper powers, not this court, to make the desirable adjustment."

(Emphasis Supplied)

Boyd, supra (1964), 378 U.S. at page 44, 84 S.Ct. at page 1525.

As pointed out by this court in **Boyd** (378 U.S. at 43 and 44, Footnote 5, 84 S.Ct. at page 1521) the Tennessee Supreme Court in the **Boyd** case, refused to permit the state to collect the sales tax from the contractors, relying on **Kern-Limerick, Inc. v. Spurlock**, supra, because of the fact that the contracts and the purchase orders in the **Boyd** case expressly provided "that the company will make payment hereunder from government funds and not from its own assets * * * and that nothing herein shall preclude liability of the government for any payment properly due hereunder if for any reason such payment is not made by the company from such government funds."

(Emphasis Supplied)

378 U.S., pages 43 and 44, Footnotes 4 and 5, 84 S.Ct., pages 1520 and 1521.

In other words under the contracts and purchase orders the vendors were to be paid with government funds, and not those of the contractor, and under the purchase orders the government made itself liable directly to the vendors for the purchases of materials, etc.

This is just the antithesis of the situations in **King & Boozer** and in this case, and where the principles of the Boyd case are applicable.

And while the Tennessee Court held such purchases to be direct sales to the United States and the government to be the purchaser, it held that the contractor was an independent contractor, and that the use of the materials by the contractor, as such, were taxable under the Tennessee Use Tax Law. The United States Supreme Court affirmed (84 S.Ct., at page 1525) as to the holding that the Tennessee Use Tax was due by the contractor as an independent contractor, but in doing so it noted that no question was raised concerning the validity of the holding of the Tennessee Court in regard to the sales tax. Thus, seemingly implying that it might not have agreed with the Tennessee Court's holding as to the sales tax, had that question been raised. (See in this respect 378 U.S., at pages 43 and 44, Footnote 5, 84 S.Ct., at page 1521).

This is also believed to be the case as **King & Boozer** and **Curry** were mainly the cases relied upon by this court in the **Boyd** case (1964), and because the court both reiterated and reaffirmed the doctrine of those cases. (378 U.S., at pages 44, 45, 49, 50, and 51, 84 S.Ct., at pages 1521, 1522, and 1525).

At any rate neither of the contracts in these cases, nor the purchase orders, have any such provisions as those in the

Boyd case. The Contracts 2577 and 5608 expressly state that the materials, etc., are to be furnished by the Appellee "as an independent contractor and not as an agent of the government." Moreover, the purchases were all made in the name of the Appellee, as the contractor, and the vendors billed the Appellee for the materials, etc., and the Appellee paid for them with its own funds. There was not even the slightest intimation to the vendors or suppliers that the government was the purchaser. The undisputed evidence is that the suppliers looked exclusively to the Appellant, the contractor, for payment and not to the government. Thus, the Appellant, and not the government, was clearly the "purchaser" on whom the tax is said to fall. (See R. pp. 246, 245, 310, and 265. Purchase Orders, R. pp. 904-1029, incl., Billings or Invoices, R. pp. 1030-1039, incl.)

The economic and social adjustments of the 1930's, requiring increased governmental activities, caused the states to enact general sales taxes to meet the demands for increased expenditures. With the purchasing power of the nation supported by federal work programs, the states viewed these projects as a justified source of taxation considering the fact that the contractors were private business concerns realizing substantial profits and fees from such programs, the same as if they were working for private concerns. James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, presented the issue of whether state taxation of contractors involved in these projects was an intrusion upon federal immunity. A West Virginia Sales Tax upon a contractor engaged in constructing a dam for the United States was upheld as a tax not upon the government or its property, but upon an independent contractor. The advent of the Second World War and the attendant dependence of the government upon private contractors again raised the immunity question. Two cases asserting immunity from Alabama tax,

Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, involving the sales tax, and **Curry v. United States**, 314 U.S. 14, 62 S.Ct. 48, involving the use tax, were concluded in favor of the right of the state to tax. The court declared that the government was not the purchaser and reasoned that "the Constitution without implementation by congressional legisl[illegible] does not forbid a tax upon government contractors becau[illegible]rden is passed on economically by the terms of the contr[illegible], or otherwise, as a part of the construction cost to the government. In place of the economic burden test, this court espoused the legal incidence test: if the legal incidence of the state tax is directly upon the United States, it is violative of the Federal Government's immunity; if the government is only indirectly affected through increased cost of materials or services, the tax is valid. The states' victory, as represented by this criterion emphasizing form rather than substance, was lessened by **Kern-Limerick, Inc. v. Spurlock**, 347 U.S. 110, 74 S.Ct. 403 (1954), a case factually similar to **King & Boozer**.

The important distinction was that the **Kern-Limerick, Inc.** contract labeled the contractor as a purchasing agent for the United States, with the United States directly liable to the vendor for the cost and with the title vesting immediately in the United States. Holding the purchase to have been made by an authorized agent of the United States, this court viewed the transaction as constitutionally immune from sales taxation. The case is significant because of its recognition of the concept of "contract agency." Logically, the decision represented not an overruling of **King & Boozer**, but a corollary to it.

This court in **United States v. Boyd**, 378 U.S. 39, 84 S.Ct. 1518, accepted the principles of **Boozer, Curry, Esso** (345 U.S. 495, 73 S.Ct. 80) and **Muskegon** (355 U.S. 484, 78 S.Ct.

483), as providing the proper balance between the interest of the state to tax and the interest of the United States to be free from taxation. Alteration of these principles the court found not to be its responsibility, but that of congress. As to the applicability of these principles to the instant case, the court established as the vital consideration the fact that **Carbide** and **Ferguson** were using the property for their own commercial benefit[*5] as part of their regular business activities. It is this use for private ends that the court marked as a separate and taxable activity.

The decision of this court in **Boyd** is significant in two regards. First, as an immediate practical consideration AEC Contractors, previously granted statutory immunity from state taxation, are placed in the same position as all other government contractors. Of greater significance, however, is the resulting contraction of the immunity area, and a further isolation of **Kern-Limerick**. The opinion, though terse, reveals a categorical affirmance of the **King & Boozer** "legal incidence" test, with the measure of "benefit" to the contractor serving as an additional determing factor.

From the standpoint of constitutional theory, the primary objection to the granting of tax immunity to contractors with the government is that private commercial concerns are thereby cloaked with federal sovereignty in derogation of state sovereignty; also that it is discriminatory as against other private contractors. Whatever the view may be as to the merits and demerits of immunity, for the present the limits remain

[*5] The appellant, Boeing, used all of the materials, etc., which it purchased in these cases in performing contracts No. 2577 and 5608, and earning its fixed fees of same, to wit, $492,038.00, and $25,215,111.00, respectively. See Contracts 2577 and 5608, and supplements thereto, Exhibits 1(a) and 1(b), R. pp. 318 and 442, respectively.

prescribed by the "legal incidence" test. In the absence of a formal declaration of agency*6 as existed in **Kern-Limerick**, the states can tax those contractors who purchase or use the property for their own private commercial benefit. The case of **United States v. Boyd**, supra, as decided by this court, has clearly laid down these principles, and until it is overturned, if ever, by this court it represents the latest decision and guiding light in the government contractor field.

REASON II: The Decision Below Is In Full Keeping With The State Court Decisions, Where Facts Are Similar.

Some of the cases, where facts are similar and which are in full keeping with the decision of the Alabama Supreme Court in these cases are:

Goodyear Aircraft Corp. v. Arizona State Tax Commission, 402 P.(2d) 423, at 429-431 (1965).

Thiokol Chemical Corp. v. Peterson, 15 Utah (2d) 355, 303 P.(2d) 391, at 393-395 (1964).

Associated Contractors v. Hamm, as Commissioner of Revenue, 277 Ala. 500, 172 So.(2d) 385 (1965).

Carbide and Carbon Chemical Corp. v. Carson, 192 Tenn. 150, 239 S.W. (2d) 27 (1951).

The rationale of all of the foregoing cases, is best summed up by the Arizona Supreme Court in the **Goodyear Aircraft Corporation** case, as follows:

"We therefore hold that since the purchase orders (contracts) in question were entered into in the name of the contractor, on the contractor's credit and with

*6 Here in prime and in cost-plus contracts, Nos. 2577 and 5608, the formal declaration is that the Appellant, contractor, is to perform the contract, and furnish the labor, materials, etc., "as an independent contractor and not as an agent of the government." Exhibits 1(a) and 1(b), R. pp. 320 and 444, respectively.

nothing more denoting that the contractor acted for the United States than in most instances a Government contract number, some limited Government control, and in some instances title vesting immediately in the Government, that the sales were not direct sales to the Government. As such the trial court's finding is reversed on this issue."

(Emphasis Supplied)

Goodyear Aircraft Corp. v. Arizona State Tax Com'n., 402 P.(2d) 423, at 431.

The Arizona court in the same case (402 P.(2d) 423, at pages 429-430), clearly distinguishes the **Tawes, Avaco, General Motors Company** and other state court cases referred to by the Appellant on page 24 of its Jurisdictional Statement, and points out that practically all of those cases had provisions in either the contracts or the purchase orders similar to the contracts and purchase orders in **Kern-Limerick, Inc. v. Spurlock**, 347 U.S. 110. That is certainly not the case here.

United States v. Livingston, 179 F. Supp. 9, Aff'd per curiam 346 U.S. 281, involves facts entirely different from those involved in these cases. Du Pont, the contractor in **Livingston**, was not paid a fee or any profit, it was a "dollar-a-year-man." All purchases were made with government funds, and the vendors were paid with such funds. Moreover, the government's credit was pledged to the vendors and not that of the contractor. The contract expressly provided that Du Pont was to perform same as the agent of the government. The situation, as well as the contract, has been said to be a most unusual one, and the case not to set a precedent.

CONCLUSION

The conclusive evidence in these cases shows that the Appellant, as the cost-plus contractor, purchased the materials, etc., which it used in performing cost-plus-fixed-fee contracts Nos. 2577 and 5608, in its own name and with its own funds, or by pledging or risking its own credit. These cases then clearly fall within the scope of **Alabama v. King & Boozer**, 314 U.S. 1, and **Curry v. United States**, 314 U.S. 14, and the principles thereof which have been recently restated and reaffirmed in **United States v. Boyd**, 378 U.S. 39. The decision of the Alabama Supreme Court merely follows said cases. The question has already been resolved against the Appellant. There is no need for further review. The appeal should be dismissed, and the decision of the Alabama Supreme Court affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, William H. Burton, of Counsel for the Appellee hereb certify that I have served copies of the above and foregoi Motion to Dismiss or Affirm and Brief in Support Thereof the Honorables John Bingham and William J. Ward, Marti Balche, Bingham, Hawthorne and Williams, 600 North 18 Street, Birmingham, Alabama, 35203, as Counsel of record f the Appellant, by mailing copies thereof in a duly addresse envelope, with first class postage prepaid, on this the _____ day of February, 1969.

WILLIAM H. BURTON, Of Counsel for Appelle

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

THE BOEING COMPANY *v.* HAMM, COMMISSIONER OF REVENUE, ALABAMA.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 1017. Decided March 24, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.